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ANALYSIS OF CONSTITUTIONAL ISSUES IN UKRAINE ACCORDING TO INTERNATIONAL AND REGIONAL GUIDELINES

AND

COMPARISON OF CONSTITUTIONAL LANGUAGE WITH OTHER CONSTITUTIONS IN EASTERN EUROPE

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1. INTRODUCTION

This report analyzes constitutional issues identified by the Venice Commission and other commentators as potentially problematic in the current Constitution of Ukraine.

The 21 issues analyzed were extracted from the December 2013 Opinion of the European Commission for Democracy through Law (the Venice Commission) on Proposals Amending the Draft Law on the Amendments to the Constitution to Strengthen the Independence of Judges of Ukraine. Almost all of these 21 issues bear directly on judicial independence and impartiality, issues the European Charter on the Statute for Judges recommends be embedded at the highest levels of domestic law.

Although we understand there are currently no proposed amendments under discussion, we believe the issues in the 2013 Venice Commission Opinion are likely to be raised again during future discussions about constitutional reform in Ukraine.

Our analysis incorporates several distinct steps. Since Ukraine signed the International Covenant on Civil and Political Rights in 1968 and ratified it in 1973, its terms are binding in the country. Article 9 of the Constitution of Ukraine acknowledges that international treaties that are in force are part of the national legislation of Ukraine. The first stage of our analysis, therefore, focuses on international laws and guidelines that are applicable to each constitutional issue.

Since Ukraine also became a member of the Council of Europe in 1995, the European Convention on Human Rights and opinions of its Committee of Ministers are also binding. This analysis therefore also refers to binding and guiding principles under European hard and soft law.

In order to provide a basis for comparison, the 21 constitutional issues were next analyzed according to language in the current Constitution of Ukraine and six other Constitutions in the region: Moldova, Romania, Poland, Lithuania, Georgia and Kosovo. The Constitution of Kosovo was particularly instructive in this exercise since, as the newest Constitution in the region, its drafters were recently required to grapple with most of the same legal and constitutional issues now facing Ukraine.

Following the analyses on applicable international and regional guidelines and comparative analyses of Constitutions in the region in each section, our Commentary focuses on whether the various Constitutions comply with their legal requirements and assesses the strengths and weaknesses of the language used.

2. RIGHT TO A FAIR TRIAL WITHIN A REASONABLE TIME

GUIDELINES

INTERNATIONAL

International Convention on Civil and Political Rights

Article 9(3). Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.

International Association of Judges Universal Charter of the Judge

Judges shall in all their work ensure the rights of everyone to a fair trial. They shall promote the right of individuals to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, in the determination of their civil rights and obligations or of any criminal charge against them.

REGIONAL

European Convention on Human Rights

ARTICLE 6 Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

Yuriy Nikolayevich Ivanov v. Ukraine [European Court of Human Rights (15/10/2009)]

The ECtHR held that a delay of more than seven years in enforcing the court's judgment, caused by a combination of factors including the lack of budgetary funds, bailiffs' omissions, and shortcomings in national legislation, violated Article 6 § 1 and Article 1 of Protocol No. 1 of the European Convention on Human Rights.

Merit v. Ukraine [European Court of Human Rights (30/3/2004)]

The ECtHR unanimously held that a period of more than six years since the opening of criminal proceedings violated Article 6(1) of the European Convention on Human Rights.

CONSTITUTIONAL COMPARISON UKRAINE [CURRENT]

Nothing in the Constitution about right to fair trial within a reasonable time.

MOLDOVA

Nothing per se about right to fair trial within a reasonable period of time.

ROMANIA

Article 21: Free Access to Justice

3. All parties shall be entitled to a fair trial and to the resolution of their cases within a reasonable time.

POLAND

Article 45

1. Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court.

LITHUANIA

Article 31

A person charged with the commission of a crime shall have the right to a public and fair hearing of his case by an independent and impartial court.

GEORGIA

Nothing specific regarding right to fair trial within a reasonable time in the Constitution.

KOSOVO

Article 31: Right to Fair and Impartial Trial

2. Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges within a reasonable time by an independent and impartial tribunal established by law.

COMMENTARY

International and regional law to which Ukraine is a party requires that anyone charged with a crime be given a fair trial within a reasonable period of time. However, this requirement does not appear in the current Constitution of Ukraine or in the Constitutions of Moldova or Georgia. Although the Constitution of Lithuania requires a fair and public hearing, there is no requirement that this take place within a reasonable period of time.

Ukraine has been criticized by the European Court of Human Rights for failing to provide trials within a reasonable period of time, and it is recommended that the Constitution be amended to provide for this right.

3. ESTABLISHMENT OF COURT STRUCTURE/NETWORK

GUIDELINES

INTERNATIONAL

International Covenant on Civil and Political Rights

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a **competent, independent and impartial tribunal established by law**.

United Nations Basic Principles on the Independence of the Judiciary

Independence of the Judiciary

3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

REGIONAL

Report on "European Judicial Systems – Edition 2014 (2012 data): Efficiency and Quality of Justice" [Ministers of the Council of Europe/European Commission for the Efficiency of Justice]

Chapter 5. Courts

A *court* is defined in the explanatory note as a “body established by law and appointed to adjudicate on specific type(s) of judicial disputes within a specified administrative structure where one or several judge(s) is/are sitting, on a temporary or permanent basis.”

Courts perform different tasks according to the competences that are described by law. . . . A comparison of the court systems between the member states or entities needs to be addressed with care, taking into consideration the differences in competences.

Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities (*Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies*)

22. The principle of judicial independence means the independence of each individual judge in the exercise of adjudicating functions. In their decision making judges should be independent and impartial and able to act without any restriction, improper influence, pressure, threat or interference, direct or indirect, from any authority, including authorities internal to the judiciary. **Hierarchical judicial organisation should not undermine individual independence.**

Zimmermann and Steiner v. Switzerland; European Court of Human Rights [13 July 1983]:

States must “organise their legal systems so as to allow the courts to comply with the requirements of Article 6 § 1 including that of trial within a ‘reasonable time.’”

CONSTITUTIONAL COMPARISON

UKRAINE [CURRENT]

Article 125

In Ukraine, the system of courts of general jurisdiction is formed in accordance with the territorial principle and the principle of specialisation.

The Supreme Court of Ukraine is highest judicial body in the system of courts of general jurisdiction.

The respective high courts are the highest judicial bodies of specialised courts.

Courts of appeal and local courts operate in accordance with the law. The creation of extraordinary and special courts shall not be permitted.

MOLDOVA

Article 115: Courts of law

1. Justice shall be carried out by the Supreme Court of Justice, courts of appeal and courts of law.
2. For certain categories of cases special law courts may operate under the law.
3. The foundation of extraordinary courts shall be forbidden.
4. The structure of the law courts, their ambit of competence and legal proceedings shall be laid down by organic law.

ROMANIA

Article 126: Courts of Law

1. Justice is administered by the High Court of Cassation and Justice and the other courts of law established by law.
2. The jurisdiction of the courts of law and the judicial procedure are exclusively regulated by law.
3. The High Court of Cassation and Justice ensures the uniform interpretation and implementation of the law by the other courts of law in all matters falling within its jurisdiction.
4. The composition of the High Court of Cassation and Justice and the rules governing its functioning are established by organic law.
5. It is prohibited to set up courts with special jurisdiction. Courts specialized in certain areas of law may be set up by an organic law which may provide, as the case may be, for the participation of persons from outside the judiciary.
6. The judicial control of administrative measures taken by public authorities by way of litigation before the administrative law courts is guaranteed, with the exception of those acts which concern the relations with Parliament and the military command acts. The jurisdiction of the

courts which are competent to adjudicate administrative law disputes extends to the decision of applications filed by persons claiming a violation of their rights by ordinances, or by provisions in those ordinances that have been declared unconstitutional.

POLAND

Article 175

1. The administration of justice in the Republic of Poland shall be implemented by the Supreme Court, the common courts, administrative courts and military courts.
2. Extraordinary courts or summary procedures may be established only during a time of war.

Article 176

1. Court proceedings shall have at least two stages.
2. The organizational structure and jurisdiction as well as procedure of the courts shall be specified by statute.

Article 177

The common courts shall implement the administration of justice concerning all matters save for those statutorily reserved to other courts.

LITHUANIA

Article 111

The courts of the Republic of Lithuania shall be the Supreme Court of Lithuania, the Court of Appeal of Lithuania, regional courts and local courts.

For the consideration of administrative, labour, family and cases of other categories, specialised courts may be established according to law.

Courts with extraordinary powers may not be established in the Republic of Lithuania in a time of peace.

The formation and competence of courts shall be established by the Law on Courts of the Republic of Lithuania.

GEORGIA

Article 82

1. Judicial power shall be exercised by means of constitutional control, justice and other forms determined by law.
2. Acts of courts shall be obligatory for all state bodies and persons throughout the whole territory of the country.
3. The judiciary shall be independent and exercised exclusively by courts.
4. A court shall adopt a judgment in the name of Georgia.
5. The cases shall be considered by juries before the courts of general jurisdiction in accordance with a procedure and in cases prescribed by law.

Article 83

1. The Constitutional Court of Georgia shall be the judicial body of Constitutional review. Its authority, the procedures of its creation and activity shall be determined by the Constitution and the Organic Law.
2. Justice shall be administered by courts of general jurisdiction. Their system and legal proceedings shall be determined by law.
3. Introduction of a court martial shall be permissible at war and exclusively within the system of the courts of general jurisdiction.
4. Creation of either extraordinary or special courts shall be prohibited.

KOSOVO

Article 103: Organization and Jurisdiction of Courts

1. Organization, functioning and jurisdiction of the Supreme Court and other courts shall be regulated by law.
2. The Supreme Court of Kosovo is the highest judicial authority.
7. Specialized courts may be established by law when necessary, but no extraordinary court may ever be created.

COMMENTARY

The organization, framework and competencies of courts vary among the countries surveyed. International standards only require that courts be competent, independent, and impartial. European guidelines recognize variations in court structures and competencies as long as judicial hierarchies do not compromise judicial independence and cases can be tried within parameters specified by the European Convention on Human Rights.

Whereas Supreme Courts exist in Ukraine, Moldova, Poland, Lithuania and Kosovo, the highest court in Romania is the Court of Cassation. Constitutional Courts exist in some countries, and Supreme Courts adjudicate constitutional issues in others. As long as principles of competence, independence and impartiality are met, the parameters and details of court organization may be regulated by law, not necessarily in the Constitution.

4. JUDICIAL BRANCH BUDGET

GUIDELINES

INTERNATIONAL

United Nations Basic Principles on the Independence of the Judiciary

7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

Universal Charter of the Judge

Article 14 Support

The other powers of the State must provide the judiciary with the means necessary to equip itself properly to perform its function. The judiciary must have the opportunity to take part in or to be heard on decisions taken in respect to this matter.

International Association of Judicial Independence and World Peace Mt. Scopus Approved Revised International Standards of Judicial Independence [March 19, 2008]

2.17. It is the duty of the state to provide adequate financial resources to allow for the due administration of justice.

REGIONAL

Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities (*Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies*)

Resources

33. Each state should allocate adequate resources, facilities and equipment to the courts to enable them to function in accordance with the standards laid down in Article 6 of the Convention and to enable judges to work efficiently.

European Charter on the Statute for Judges

1.6. The State has the duty of ensuring that judges have the means necessary to accomplish their tasks properly, and in particular to deal with cases within a reasonable period.

CONSTITUTIONAL COMPARISON

UKRAINE [CURRENT]

Article 130

The State ensures funding and proper conditions for the operation of courts and the activity of judges. Expenditures for the maintenance of courts are allocated separately in the State Budget of Ukraine.

MOLDOVA

Article 121: Budget of the courts of law, indemnity and other rights

1. The budget of the courts of law shall be approved by the Parliament and included in the state budget.

ROMANIA

Nothing in the Constitution regarding judicial budget.

POLAND

Nothing in the Constitution regarding judicial budget.

LITHUANIA

Nothing in Constitution regarding judicial budget.

GEORGIA

Nothing in Constitution regarding judicial budget.

KOSOVO

Article 108: Kosovo Judicial Council

5. The Kosovo Judicial Council is responsible for conducting judicial inspections, judicial administration, developing court rules in accordance with the law, hiring and supervising court administrators, developing and overseeing the budget of the judiciary, determining the number of judges in each jurisdiction and making recommendations for the establishment of new courts.

COMMENTARY

Neither international nor regional guidelines require that the judicial branch have the power to advocate for or manage its own budget. However, the most recent Constitution in the region, in Kosovo, delegates authority for developing and overseeing the judicial budget to the Kosovo Judicial Council. The current Constitution of Ukraine provides for a distinct judicial budget, separate from the budgets for other branches of government, a feature not required by other Constitutions in the region.

It should be noted that in the 2015 Report by the Secretary General of the Council of Europe on the State of Democracy, Human Rights and the Rule of Law in Europe, institutional judicial independence is linked directly to allocation of sufficient funds to the judiciary to enable it to carry out its functions. The report also recommends that the judiciary be given a role in deciding how its funds are allocated.

5. ROLE AND JURISDICTION OF SUPREME COURT

GUIDELINES

INTERNATIONAL

No international standards.

REGIONAL

No regional standards.

CONSTITUTIONAL COMPARISON

UKRAINE [CURRENT]

Article 125

The Supreme Court of Ukraine is highest judicial body in the system of courts of general jurisdiction.

MOLDOVA

Article 115: Courts of law

1. Justice shall be carried out by the Supreme Court of Justice, courts of appeal and courts of law.
4. The structure of the law courts, their ambit of competence and legal proceedings shall be laid down by organic law.

ROMANIA

There is no Supreme Court in Romania. The following constitutional provisions govern the Court of Cassation:

Article 126: Courts of Law

1. Justice is administered by the High Court of Cassation and Justice and the other courts of law established by law.
2. The jurisdiction of the courts of law and the judicial procedure are exclusively regulated by law.
3. The High Court of Cassation and Justice ensures the uniform interpretation and implementation of the law by the other courts of law in all matters falling within its jurisdiction.
4. The composition of the High Court of Cassation and Justice and the rules governing its functioning are established by organic law.

POLAND

Article 175

1. The administration of justice in the Republic of Poland shall be implemented by the Supreme Court, the common courts, administrative courts and military courts.

Article 183

1. The Supreme Court shall exercise supervision over common and military courts regarding judgments.
2. The Supreme Court shall also perform other activities specified in the Constitution and statutes.

LITHUANIA

Article 111

The courts of the Republic of Lithuania shall be the Supreme Court of Lithuania, the Court of Appeal of Lithuania, regional courts and local courts.

GEORGIA

Article 90

1. In accordance with the established procedure the Supreme Court of Georgia shall supervise the administration of justice in the courts of general jurisdiction of Georgia, shall consider the cases as determined by law acting as a first instance court.

3. The authority, organisation of the Supreme Court of Georgia and the procedure of activity and of the pre-term termination of the office of the judges of the Supreme Court shall be determined by law.

KOSOVO

Article 103: Organization and Jurisdiction of Courts

1. Organization, functioning and jurisdiction of the Supreme Court and other courts shall be regulated by law.

2. The Supreme Court of Kosovo is the highest judicial authority.

3. At least fifteen percent (15%) of the judges of the Supreme Court, but not fewer than three (3) judges, shall be from Communities that are not in the majority in Kosovo.

4. The President of the Supreme Court of Kosovo shall be appointed and dismissed by the President of the Republic of Kosovo from among the judges of the Supreme Court for a non-renewable term of seven (7) years upon proposal by the Kosovo Judicial Council for the appointment or dismissal.

COMMENTARY

There are no international or regional standards relating to either the role or the jurisdiction of the Supreme Court in a domestic system. Each of the constitutions studied, with the exception of the current Constitution of Ukraine, provides that the role and jurisdiction of the Supreme Court shall be established by statute. The Constitution of Georgia specifies that a statute may designate those circumstances under which the Supreme Court has jurisdiction to act as a first instance court. This feature is not unique to Georgia and can be found in other constitutions of the world. The authority of the Supreme Court to act as a court of first instance can be found, for example, in Article III of the United States Constitution, and that Article actually defines the circumstances under which the Supreme Court can so act.

The only other point to be made on this subject is that in Romania, as in many other countries of the Romano-Germanic tradition, especially those that are based upon the French model, the Supreme Court is referred to as the Court of Cassation, and this nomenclature has some significance because it refers to a court which exercises an appellate jurisdiction of question of

law exclusively. This aspect of the jurisdiction of these courts distinguishes it from the jurisdiction of the courts of appeal which fall beneath it in the hierarchy of courts. The courts of appeal in countries of that legal tradition have jurisdiction over questions of both law and fact.

6. ROLE AND JURISDICTION OF CONSTITUTIONAL COURT

GUIDELINES

INTERNATIONAL

No international guidelines.

REGIONAL

No regional guidelines.

CONSTITUTIONAL COMPARISON

UKRAINE [CURRENT]

Article 147

The Constitutional Court of Ukraine is the sole body of constitutional jurisdiction in Ukraine. The Constitutional Court of Ukraine decides on issues of conformity of laws and other legal acts with the Constitution of Ukraine and provides the official interpretation of the Constitution of Ukraine and the laws of Ukraine.

Article 150

The authority of the Constitutional Court of Ukraine comprises:

1. deciding on issues of conformity with the Constitution of Ukraine (constitutionality) of the following:

- laws and other legal acts of the Verkhovna Rada of Ukraine;
- acts of the President of Ukraine;
- acts of the Cabinet of Ministers of Ukraine;
- legal acts of the Verkhovna Rada of the Autonomous Republic of Crimea.

2. the official interpretation of the Constitution of Ukraine and the laws of Ukraine;

Article 151

The Constitutional Court of Ukraine, on the appeal of the President of Ukraine or the Cabinet of Ministers of Ukraine, provides opinions on the conformity with the Constitution of Ukraine of international treaties of Ukraine that are in force, or the international treaties submitted to the Verkhovna Rada of Ukraine for granting agreement on their binding nature.

On the appeal of the Verkhovna Rada of Ukraine, the Constitutional Court of Ukraine provides an opinion on the observance of the constitutional procedure of investigation and consideration of the case of removing the President of Ukraine from office by the procedure of impeachment.

MOLDOVA

Article 134: Statute

1. Constitutional Court shall be the sole body of constitutional jurisdiction in the Republic of Moldova.
2. Constitutional Court shall be independent of any other public authority and shall obey only the Constitution.
3. Constitutional Court shall guarantee the **supremacy of the Constitution, shall ascertain the enforcement of the principle of separation of the State power into the legislature, executive and judiciary, and it shall guarantee the responsibility of the State towards the citizen and of the citizen towards the State.**

Article 135: Powers

1. The Constitutional Court shall:
 - a. exercise, upon appeal, the constitutionality review over laws and decisions of the Parliament, Presidential decrees, decisions and ordinances of the Government, as well as the international treaties to which the Republic of Moldova is a party;
 - b. give the interpretation of the Constitution;
 - c. formulate its position on initiatives aimed at revising the Constitution;
 - d. confirm the results of republican referenda;
 - e. confirm the results of parliamentary and presidential elections in the Republic of Moldova;
 - f. ascertain the circumstances justifying the dissolution of the Parliament, the suspension from office of the President of the Republic of Moldova or the interim office of the President, as well as the impossibility of the President of the Republic of Moldova to fully exercise his/her functional duties for more than 60 days;
 - g. solve the pleas of unconstitutionality of legal acts, as claimed by the Supreme Court of Justice;
 - h. decide over matters dealing with the constitutionality of a party.

ROMANIA

Article 146: Functions

The Constitutional Court has the following functions:

- a. to pronounce on the constitutionality of laws before their promulgation upon request of the President of Romania, one of the presidents of the two Chambers, the Government, the High Court of Cassation and Justice, the People's Attorney, at least 50 deputies or 25 senators, as well as on its own initiative [ex officio] on proposals for the amendment of the Constitution;
- b. to pronounce on the constitutionality of treaties or other international agreements upon request by one of the presidents of the two Chambers, or at least 50 deputies or 25 senators;
- c. to pronounce on the constitutionality of the rules of procedure of Parliament at the request of one of the presidents of the two Chambers, a parliamentary group, at least 50 deputies or 25 senators;

- d.** to decide on objections as to the unconstitutionality of laws and ordinances brought before courts of law or commercial arbitration tribunals; the objection of unconstitutionality may also be brought up directly by the People's Attorney;
- e.** to solve legal disputes of a constitutional nature between public authorities, upon request of the President of Romania, one of the presidents of the two Chambers, the Prime Minister, or of the President of the High Council of the Judiciary;
- f.** to ensure the observance of the procedure prescribed for the election of the President of Romania and to confirm the election results;
- g.** to ascertain the existence of circumstances which justify an interim in the exercise of the office of President of Romania and to communicate its findings to Parliament and the Government;
- h.** to provide an advisory opinion on the proposal to suspend the President of Romania from office;
- i.** to ensure compliance with the procedure for organizing and holding a referendum and to confirm its results;
- j.** to examine the compliance with the conditions for the exercise of the right to legislative initiative by the citizens;
- k.** to decide on disputes regarding the constitutionality of a political party;
- l.** to perform all other functions assigned to it by the organic law of the Court.

POLAND

Article 188

The Constitutional Tribunal shall adjudicate regarding the following matters:

- 1.** the conformity of statutes and international agreements to the Constitution;
- 2.** the conformity of a statute to ratified international agreements whose ratification required prior consent granted by statute;
- 3.** the conformity of legal provisions issued by central State organs to the Constitution, ratified international agreements and statutes;
- 4.** the conformity to the Constitution of the purposes or activities of political parties;
- 5.** complaints concerning constitutional infringements, as specified in Article 79, para. 1.

Article 189

The Constitutional Tribunal shall settle disputes over authority between central constitutional organs of the State.

LITHUANIA

Article 102

The Constitutional Court shall decide whether the laws and other acts of the Seimas are not in conflict with the Constitution and whether the acts of the President of the Republic and the Government are not in conflict with the Constitution or laws.

The status of the Constitutional Court and the procedure for the execution of its powers shall be established by the Law on the Constitutional Court of the Republic of Lithuania.

Article 105

The Constitutional Court shall consider and adopt a decision whether the laws of the Republic of Lithuania and other acts adopted by the Seimas are not in conflict with the Constitution of the Republic of Lithuania.

The Constitutional Court shall also consider if the following are not in conflict with the Constitution and laws:

1. acts of the President of the Republic;
2. acts of the Government of the Republic.

The Constitutional Court shall present conclusions:

1. whether there were violations of election laws during elections of the President of the Republic or elections of members of the Seimas;
2. whether the state of health of the President of the Republic allows him to continue to hold office;
3. whether international treaties of the Republic of Lithuania are not in conflict with the Constitution;
4. whether concrete actions of Members of the Seimas and State officials against whom an impeachment case has been instituted are in conflict with the Constitution.

GEORGIA

Article 83

1. The Constitutional Court of Georgia shall be the judicial body of Constitutional review. Its authority, the procedures of its creation and activity shall be determined by the Constitution and the Organic Law.

Article 88

1. The Constitutional Court of Georgia shall exercise the judicial power by virtue of the constitutional legal proceedings.

Article 89

1. The Constitutional Court of Georgia on the basis of a constitutional claim or a submission of the President of Georgia, the Government, not less than one fifth of the members of the Parliament, a court, the higher representative bodies the Autonomous Republic of Abkhazia and the Autonomous Republic of Ajara, the Public Defender or a citizen in accordance with a procedure established by the Organic Law (Change is added by the Constitutional Law of Georgia of the 20th of April 2000) shall: (Acquired a new wording by the Constitutional Law of the 6th of February 2004):

A. Adjudicate upon the constitutionality of a Constitutional Agreement, law, normative acts of the President and the Government, the normative acts of the higher state bodies of the Autonomous Republic Abkhazia and the Autonomous Republic of Ajara

- B. Consider dispute on competence between state bodies;
 - C. Consider constitutionality of formation and activity of political associations of citizens;
 - D. Consider dispute on constitutionality of referenda and elections;
 - E. Consider constitutionality of international treaties and agreements;
 - F. Consider on the basis of a constitutional claim of a citizen constitutionality of normative acts in terms of the issues of Chapter Two of the Constitution;
 - G. Exercise other powers determined by the Constitution and the Organic Law of Georgia.
2. The judgment of the Constitutional Court shall be final. A normative act or a part thereof recognised as unconstitutional shall cease to have legal effect from the moment of the promulgation of the respective judgment of the Constitutional Court.

KOSOVO

Article 112: General Principles

1. The Constitutional Court is the final authority for the interpretation of the Constitution and the compliance of laws with the Constitution.
2. The Constitutional Court is fully independent in the performance of its responsibilities.

Article 113: Jurisdiction and Authorized Parties

1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.
2. The Assembly of Kosovo, the President of the Republic of Kosovo, the Government, and the Ombudsperson are authorized to refer the following matters to the Constitutional Court:
 1. the question of the compatibility with the Constitution of laws, of decrees of the President or Prime Minister, and of regulations of the Government;
 2. the compatibility with the Constitution of municipal statutes.
3. The Assembly of Kosovo, the President of the Republic of Kosovo and the Government are authorized to refer the following matters to the Constitutional Court:
 1. conflict among constitutional competencies of the Assembly of Kosovo, the President of the Republic of Kosovo and the Government of Kosovo;
 2. compatibility with the Constitution of a proposed referendum;
 3. compatibility with the Constitution of the declaration of a State of Emergency and the actions undertaken during the State of Emergency;
 4. compatibility of a proposed constitutional amendment with binding international agreements ratified under this Constitution and the review of the constitutionality of the procedure followed;
 5. questions whether violations of the Constitution occurred during the election of the Assembly.
4. A municipality may contest the constitutionality of laws or acts of the Government infringing upon their responsibilities or diminishing their revenues when municipalities are affected by such law or act.

5. Ten (10) or more deputies of the Assembly of Kosovo, within eight (8) days from the date of adoption, have the right to contest the constitutionality of any law or decision adopted by the Assembly as regards its substance and the procedure followed.
6. Thirty (30) or more deputies of the Assembly are authorized to refer the question of whether the President of the Republic of Kosovo has committed a serious violation of the Constitution.
7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law.
8. The courts have the right to refer questions of constitutional compatibility of a law to the Constitutional Court when it is raised in a judicial proceeding and the referring court is uncertain as to the compatibility of the contested law with the Constitution and provided that the referring court's decision on that case depends on the compatibility of the law at issue.
9. The President of the Assembly of Kosovo refers proposed Constitutional amendments before approval by the Assembly to confirm that the proposed amendment does not diminish the rights and freedoms guaranteed by Chapter II of the Constitution.
10. Additional jurisdiction may be determined by law.

COMMENTARY

International law does not require the creation of Constitutional Courts; the ICCPR only requires that competent judicial, administrative, legislative or other authorities exist to protect fundamental rights and that the possibility of judicial remedy exists. Regional law also does not require the existence of Constitutional Courts. Nevertheless, Constitutional Courts are in place in all the surveyed countries.

Jurisdiction and competencies of the various Constitutional Courts vary somewhat from country to country. Generally speaking, the main role of Constitutional Courts is to serve as final authority for the interpretation of the Constitution and the compliance of laws with the Constitution. Most Constitutional Courts also have jurisdiction to consider constitutionality of international treaties and agreements.

The Constitutional Court of Romania is authorized to give advisory opinions on the constitutionality of laws before their promulgation and on proposals to suspend the President of Romania from office.

The Constitutional Courts of Moldova, Lithuania and Romania review conditions for and results of referenda and/or elections, and many other constitutions of the world assign jurisdiction over electoral disputes to their constitutional courts.

Standing to refer cases to the Constitutional Court varies according to country. The right of individual access to the Constitutional Court is addressed in the following Section, Direct/Indirect Access of Individuals to Constitutional Court.

7. DIRECT/INDIRECT ACCESS OF INDIVIDUALS TO CONSTITUTIONAL COURT

GUIDELINES

INTERNATIONAL

No international standards

REGIONAL

Venice Commission Draft Study on Individual Access to Constitutional Justice (2009)

Provides a comprehensive review of forms of access to constitutional review among member states of the Venice Commission and states:

1. Among the member and observer states of the Venice Commission, **very few countries do not provide at least some type of individual access to question the constitutionality of a norm or individual act.** It is possible to distinguish between direct individual access, in which individuals are given the possibility to challenge the constitutionality of a given norm or act directly and indirect individual access, in which the constitutionality can be challenged only through state bodies. Many countries have a mixed system, both with direct means of access to constitutional justice and with indirect means.

3. Indirect access to individual justice is a very important tool to ensure respect for individual human rights at the constitutional level. **The existing choices are broad and many possibilities coexist.**

CONSTITUTIONAL COMPARISON

UKRAINE [CURRENT]

Article 55

Human and citizens' rights and freedoms are protected by the court.

Everyone is guaranteed the right to challenge in court the decisions, actions or omission of bodies of state power, bodies of local self-government, officials and officers.

Everyone has the right to appeal for the protection of his or her rights to the Authorised Human Rights Representative of the Verkhovna Rada of Ukraine.

After exhausting all domestic legal remedies, everyone has the right to appeal for the protection of his or her rights and freedoms to the relevant international judicial institutions or to the relevant bodies of international organisations of which Ukraine is a member or participant.

Everyone has the right to protect his or her rights and freedoms from violations and illegal encroachments by any means not prohibited by law.

Article 153

The procedure for the organisation and operation of the Constitutional Court of Ukraine, and the Procedure for its review of cases, are determined by law.

MOLDOVA

Nothing in Constitution regarding direct access of people to Constitutional Court.

ROMANIA

Nothing per se about direct access to Constitutional Court; however see below.

Article 21: Free Access to Justice

1. Any person may appeal to the organs of justice for the protection of his/her rights, freedoms, and legitimate interests.
2. No law may impede the exercise of this right.

POLAND

Nothing granting individual access, but see:

Article 191

1. The following may make application to the Constitutional Tribunal regarding matters specified in Article 188:

1. the President of the Republic, the Marshal of the Sejm, the Marshal of the Senate, the Prime Minister, 50 Deputies, 30 Senators, the First President of the Supreme Court, the President of the Chief Administrative Court, the Public Prosecutor-General, the President of the Supreme Chamber of Control and the Commissioner for Citizens' Rights,
2. the National Council of the Judiciary, to the extent specified in Article 186, para. 2;
3. the constitutive organs of units of local self-government;
4. the national organs of trade unions as well as the national authorities of employers' organizations and occupational organizations;
5. churches and religious organizations;
6. the subjects referred to in Article 79 to the extent specified therein.

2. The subjects referred to in para. 1 subparas. 3-5, above, may make such application if the normative act relates to matters relevant to the scope of their activity.

Article 192

The following persons may make application to the Constitutional Tribunal in respect of matters specified in Article 189: the President of the Republic, the Marshal of the Sejm, the Marshal of the Senate, the Prime Minister, the First President of the Supreme Court, the President of the Chief Administrative Court and the President of the Supreme Chamber of Control.

LITHUANIA

Nothing in Constitution regarding individual access to Constitutional Court per se, although see the following provision, which is included under Chapter II: The Human Being and the State:

Article 30

The person whose constitutional rights or freedoms are violated shall have the right to apply to court.

GEORGIA

Article 89

1. The Constitutional Court of Georgia on the basis of a constitutional claim or a submission of the President of Georgia, the Government, not less than one fifth of the members of the Parliament, a court, the higher representative bodies the Autonomous Republic of Abkhazia and the Autonomous Republic of Ajara, the Public Defender or **a citizen** in accordance with a procedure established by the Organic Law (Change is added by the Constitutional Law of Georgia of the 20th of April 2000) shall: (Acquired a new wording by the Constitutional Law of the 6th of February 2004):

A. Adjudicate upon the constitutionality of a Constitutional Agreement, law, normative acts of the President and the Government, the normative acts of the higher state bodies of the Autonomous Republic Abkhazia and the Autonomous Republic of Ajara

B. Consider dispute on competence between state bodies;

C. Consider constitutionality of formation and activity of political associations of citizens;

D. Consider dispute on constitutionality of referenda and elections;

E. Consider constitutionality of international treaties and agreements;

F. Consider on the basis of a constitutional claim of a citizen constitutionality of normative acts in terms of the issues of Chapter Two of the Constitution;

G. Exercise other powers determined by the Constitution and the Organic Law of Georgia.

KOSOVO

Article 113: Jurisdiction and Authorized Parties

7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law.

COMMENTARY

There are neither international nor regional standards that require direct access by an individual to the Constitutional Courts of their country. However, the Venice Commission Report cited above states “very few countries do not provide at least some type of individual access to question the constitutionality of a norm or individual act.”

Consequently, while there is no rule requiring direct access specifically to a constitutional court, such individual access is consistent with state practice. While that may be so, amongst the constitutions studied, the Constitution of Georgia is the only one that specifically grants individual access to the constitutional court. It should be noted in this regard that many countries in the Romano-Germanic tradition have adopted the German constitutional model on this point. Article 93 of the German Constitution grants individuals direct access (by way of a “constitutional complaint”) to the Constitutional Court, but this right has been held to require exhaustion of remedies.

8. SPECIALIZED COURTS

GUIDELINES

INTERNATIONAL

United Nations Basic Principles on the Independence of the Judiciary

5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

REGIONAL

European Convention on Human Rights

ARTICLE 6

Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

CONSTITUTIONAL COMPARISON

UKRAINE [CURRENT]

Article 125

In Ukraine, the system of courts of general jurisdiction is formed in accordance with the territorial principle and the principle of specialisation.

The respective high courts are the highest judicial bodies of specialised courts.

The creation of extraordinary and special courts shall not be permitted.

Article 127

Persons with professional training in issues of jurisdiction of specialised courts may be judges of these courts. These judges administer justice only as members of a collegium of judges.

MOLDOVA**Article 115: Courts of law**

1. Justice shall be carried out by the Supreme Court of Justice, courts of appeal and courts of law.
2. For certain categories of cases special law courts may operate under the law.
3. The foundation of extraordinary courts shall be forbidden.
4. The structure of the law courts, their ambit of competence and legal proceedings shall be laid down by organic law.

ROMANIA**Article 126: Courts of Law**

5. It is prohibited to set up courts with special jurisdiction. Courts specialized in certain areas of law may be set up by an organic law which may provide, as the case may be, for the participation of persons from outside the judiciary.

POLAND**Article 175**

1. The administration of justice in the Republic of Poland shall be implemented by the Supreme Court, the common courts, administrative courts and military courts.
2. Extraordinary courts or summary procedures may be established only during a time of war.

Article 198

1. For violations of the Constitution or of a statute committed by them within their office or within its scope, the following persons shall be constitutionally accountable to the Tribunal of State: the President of the Republic, the Prime Minister and members of the Council of Ministers, the President of the National Bank of Poland, the President of the Supreme Chamber of Control, members of the National Council of Radio Broadcasting and Television, persons to whom the Prime Minister has granted powers of management over a ministry, and the Commander-in-Chief of the Armed Forces.
2. Deputies and Senators shall also be constitutionally accountable to the Tribunal of State to extent specified in Article 107.
3. The types of punishment which the Tribunal of State may impose shall be specified by statute.

LITHUANIA

Article 111

The courts of the Republic of Lithuania shall be the Supreme Court of Lithuania, the Court of Appeal of Lithuania, regional courts and local courts.

For the consideration of administrative, labour, family and cases of other categories, specialised courts may be established according to law.

Courts with extraordinary powers may not be established in the Republic of Lithuania in a time of peace.

The formation and competence of courts shall be established by the Law on Courts of the Republic of Lithuania.

GEORGIA

Article 82

1. Judicial power shall be exercised by means of constitutional control, justice and other forms determined by law.

Article 83

4. Creation of either extraordinary or special courts shall be prohibited.

KOSOVO

Article 103: Organization and Jurisdiction of Courts

1. Organization, functioning and jurisdiction of the Supreme Court and other courts shall be regulated by law.

7. Specialized courts may be established by law when necessary, but no extraordinary court may ever be created.

COMMENTARY

A distinction should be made between specialized courts, which are recognized internationally and in most of the Constitutions examined, and extraordinary courts, which are generally prohibited. Specialized courts are organized according to specific subject matter and are usually staffed by judges with specialized expertise.

Extraordinary courts, generally created outside the constitutional framework, are usually illegal. They are specifically prohibited in the Constitutions of Moldova, Georgia and Kosovo. They are, however, permitted in Poland during times of war. Similarly, in Lithuania, the Constitution

states that courts with extraordinary powers may not be established in a time of peace, leaving open the inference that they may be created in times of war.

Specialized courts are recognized under the Constitutions of Moldova, Romania, Lithuania and Kosovo and prohibited under the Constitution of Georgia. Certain types of specialized courts are recognized in the Constitutions of Poland (administrative and military courts and a Tribunal of State, with jurisdiction to try senior officials) and Lithuania (administrative, labor and family courts).

Unless there is a problem with poor translation, constitutional language in Ukraine appears to contain an ambiguity in that the principle of court specialization is recognized in Articles 125 and 127, while Article 125 also prohibits the creation of extraordinary and special courts.

It should perhaps be noted here that the extent to which courts are specialized is a factor which distinguishes court in countries of the common law tradition from those in the Romano-Germanic tradition. The court system in Germany presents a clear example of that distinction. In Germany there are separate hierarchies of courts with jurisdiction respectively over ordinary criminal and civil matters, labor law, administrative law, tax and social security law.

For an overview of the role and function of specialized courts in the United States and selected European countries, see Zimmer, Markus B., Overview Of Specialized Courts; International Journal For Court Administration [August 2009] available at <http://www.iaca.ws/files/LWB-SpecializedCourts.pdf>

9. HIGH JUDICIAL COUNCIL

GUIDELINES

INTERNATIONAL

The Universal Charter of the Judge

Art. 11 - Administration and disciplinary action

The administration of the judiciary and disciplinary action towards judges must be organized in such a way that it does not compromise the judges' genuine independence, and that attention is only paid to considerations both objective and relevant.

Where this is not ensured in other ways that are rooted in established and proven tradition, judicial administration and disciplinary action should be carried out by independent bodies that include substantial judicial representation.

International Association of Judicial Independence and World Peace Mt. Scopus Approved Revised International Standards of Judicial Independence [Approved March 19, 2008]

2.12. Judicial matters are exclusively within the responsibility of the Judiciary, both in central judicial administration and in court level judicial administration.

2.13. The central responsibility for judicial administration shall preferably be vested in the Judiciary or jointly in the Judiciary and the Executive.

REGIONAL

The European Charter on the Statute of Judges

1.3. In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary.

Venice Commission Opinion No. 403/2006 (CDL_AD(2007)028

24. The role of the high judicial council can vary to a large extent. For example, the role of such Councils in Germany may be different depending on the level of courts. There are councils for judicial appointments which are purely advisory. In Hungary, the Act on the Organisation and Administration of Courts (Act LXVI of 1997) set up the National Judicial Council exercising the power of court administration including the appointment of judges. In Italy and in Portugal the judicial council has the power to appoint, assign, transfer and promote the judges of the courts of law and to exercise disciplinary control over them. In the Netherlands, the Council for the Judiciary operates as an intermediate only, while the nominations are in the hands of the court concerned.

25. The Venice Commission is of the opinion that **a judicial council should have a decisive influence on the appointment and promotion of judges and** (maybe via a disciplinary board set up within the council) **on disciplinary measures against them. An appeal against disciplinary measures to an independent court should be available.**

Composition of a Judicial Council

29. As regards the existing practice related to the composition of judicial councils, “a basic rule appears to be that a large proportion of its membership should be made up of members of the judiciary and that a fair balance should be struck between members of the judiciary and other ex officio or elected members.” Thus, **a substantial element or a majority of the members of the Judicial Council should be elected by the Judiciary itself.** In order to provide for democratic legitimacy of the Judicial Council, **other members should be elected by Parliament among persons with appropriate legal qualification taking into account possible conflicts of interest.**

30. In general, judicial councils include also members who are not part of the judiciary and represent other branches of power or the academic or professional sectors. Such a composition is justified by the fact that “the control of quality and impartiality of justice is a role that reaches beyond the interests of a particular judge. The Council’s performance of this control will cause citizens’ confidence in the administration of justice to be raised.” Moreover, an overwhelming supremacy of the judicial component may raise concerns related to the risks of “corporatist management.”

31. The participation of the legislative branch in the composition of such an authority is characteristic. **“In a system guided by democratic principles, it seems reasonable that the**

Council of Justice should be linked to the representation of the will of the people, as expressed by Parliament.” In general, the legislative bodies are entitled to elect part of the members of the high judicial councils among legal professionals, however in some systems members of parliament themselves are members of the judicial council. However, there are also systems where the appointment of judges is in the hands of the executive, and Members of Parliament are excluded from membership of the Judicial Council.

32. However, in order to insulate the **judicial council** from politics its **members should not be active members of parliament**. The Venice Commission is also strongly in favour of the **depolitisation** of such bodies **by providing for a qualified majority for the election of its parliamentary component**. This should ensure that a governmental majority cannot fill vacant posts with its followers. A compromise has to be sought with the opposition, which is more likely to bring about a balanced and professional composition.

33. Although the presence of the members of the executive power in the judicial councils might raise confidence-related concerns, such practice is quite common. However, **the Minister of Justice should not participate in all the council’s decisions**, for example, the ones **relating to disciplinary measures**.

34. "The presence of the Minister of Justice on the Council is of some concern, as regards matters relating to the transfer and disciplinary measures taken in respect of judges at the first level, at the appeal stage and prosecutors. The nomination of these judges and prosecutors has been exclusively entrusted to the High Council of Justice, thereby removing these decisions from undue political influence. However, it is advisable that the Minister of Justice should not be involved in decisions concerning the transfer of judges and disciplinary measures against judges, as this could lead to inappropriate interference by the Government.”

49. Such a Council should have a **decisive influence on the appointment and promotion of judges and disciplinary measures** against them.

50. A substantial element or a majority of the **members of the judicial council** should be elected by the Judiciary itself. In order to provide for democratic legitimacy of the Judicial Council, other members should be elected by Parliament among persons with appropriate legal qualifications.

See also CONSULTATIVE COUNCIL OF EUROPEAN JUDGES OPINION No 1 (2001) ON STANDARDS CONCERNING THE INDEPENDENCE OF THE JUDICIARY AND THE IRREMOVABILITY OF JUDGES: Sections 40 – 45 regarding models of councils and other bodies responsible for issues relating to appointment, promotion and tenure of judges in European countries.

CONSTITUTIONAL COMPARISON

UKRAINE [CURRENT]

Article 131

The High Council of Justice operates in Ukraine, whose competence comprises:

1. forwarding submissions on the appointment of judges to office or on their dismissal from office;
2. adopting decisions in regard to the violation by judges and procurators of the requirements concerning incompatibility;
3. exercising disciplinary procedure in regard to judges of the Supreme Court of Ukraine and judges of high specialised courts, and the consideration of complaints regarding decisions on bringing to disciplinary liability judges of courts of appeal and local courts, and also procurators.

The High Council of Justice consists of twenty members. The Verkhovna Rada of Ukraine, the President of Ukraine, the Congress of Judges of Ukraine, the Congress of Advocates of Ukraine, and the Congress of Representatives of Higher Legal Educational Establishments and Scientific Institutions, each appoint three members to the High Council of Justice, and the All-Ukrainian Conference of Employees of the Procuracy — two members of the High Council of Justice.

The Chairman of the Supreme Court of Ukraine, the Minister of Justice of Ukraine and the Procurator General of Ukraine are ex officio members of the High Council of Justice.

MOLDOVA

SECTION II: Superior Council of Magistrates

Article 122: Composition

1. The Superior Council of Magistrates shall consist of judges and university lecturers elected for tenure of 4 years.
2. The President of the Supreme Court of Justice, the Minister of Justice and the Prosecutor General shall de jure belong to the Superior Council of Magistrates.

Article 123: Powers

1. The Superior Council of Magistrates shall ensure the appointment, transfer, removal from office, upgrading and imposing of the disciplinary sentences against judges.
2. The manner of organisation and functioning of the Superior Council of Magistrates shall be laid down by organic law.

ROMANIA

Section 3: The High Council of the Judiciary

Article 133: Role and Structure

1. The High Council of the Judiciary guarantees the independence of the judiciary.
2. The High Council of the Judiciary is composed of 19 members, of whom:
 - a. 14 are elected by the general meeting of the Council and confirmed by the Senate; they are divided into two sections, one for the judges and the other for the public prosecutors; the first section is composed of 9 judges, and the second of 5 public prosecutors;

- b.** 2 representatives of civil society, experts in law, who enjoy a high professional and moral reputation, to be elected by the Senate; they shall only participate in plenary proceedings of the Council;
 - c.** the Minister of Justice, the President of the High Court of Cassation and Justice, and the Attorney General of the Public Prosecutor's Office attached to the High Court of Cassation and Justice.
- 3.** The President of the High Council of the Judiciary is elected for a non-renewable term of one year among the members listed under paragraph 2(a).
- 4.** The term of office of the members of the High Council of the Judiciary is 6 years.
- 5.** The High Council of the Judiciary takes its decisions by secret ballot.
- 6.** The President of Romania presides at the meetings of the High Council of the Judiciary in which he/she takes part.
- 7.** Decisions by the High Council of the Judiciary shall be final and irrevocable, except those listed in article 134(2).

Article 134: Duties

- 1.** The High Council of the Judiciary proposes to the President of Romania the appointment of judges and prosecutors, with the exception of trainees, in accordance with the law.
- 2.** The sections of High Council of the Judiciary serve as disciplinary courts for judges and public prosecutors, based on a procedure established by its organic law. In these cases, the Minister of Justice, the President of the High Court of Cassation and Justice, and the Attorney General of the Public Prosecutor's Office are not entitled to vote.
- 3.** Disciplinary decisions by the High Council of the Judiciary may be challenged before the High Court of Cassation and Justice.
- 4.** The High Council of the Judiciary shall also perform the other duties enumerated in its organic law, in order to fulfill its role as guarantor of the independence of the judiciary.

POLAND

Article 186

- 1.** The National Council of the Judiciary shall safeguard the independence of courts and judges.
- 2.** The National Council of the Judiciary may make application to the Constitutional Tribunal regarding the conformity to the Constitution of normative acts to the extent to which they relate to the independence of courts and judges.

Article 187

- 1.** The National Council of the Judiciary shall be composed as follows:
 - 1.** the First President of the Supreme Court, the Minister of Justice, the President of the Chief Administrative Court and an individual appointed by the President of the Republic;
 - 2.** 15 judges chosen from amongst the judges of the Supreme Court, common courts, administrative courts and military courts;
 - 3.** 4 members chosen by the Sejm from amongst its Deputies and 2 members chosen by the Senate from amongst its Senators.
- 2.** The National Council of the Judiciary shall choose, from amongst its members, a chairperson and two deputy chairpersons.

3. The term of office of those chosen as members of the National Council of the Judiciary shall be 4 years.

4. The organizational structure, the scope of activity and procedures for work of the National Council of the Judiciary, as well as the manner of choosing its members, shall be specified by statute.

LITHUANIA

Article 112

A special institution of judges provided for by law shall advise the President of the Republic on the appointment, promotion, transfer of judges, or their dismissal from office.

GEORGIA

The Constitution of Georgia does not contain specific provisions regarding a High Judicial Council. However, the High Council of Justice was established under the Organic Law of the Common Courts of Georgia of December 4, 2009:

Article 47 - High Council of Justice of Georgia

1. The High Council of Justice of Georgia shall be created to ensure the independence of courts (judges) and the quality and effectiveness of justice, to appoint and dismiss judges, to organize judicial qualification examinations, to formulate proposals towards implementing a judicial reform, and to accomplish other objectives determined by law.

The following constitutional provision governs oversight of judges:

Article 87

1. A judge shall enjoy personal immunity. Criminal proceeding of a judge, his/her arrest or detention, the search of his/her apartment, car, workplace or his/her person shall be permissible by the consent of the President of the Supreme Court of Georgia, except when he/she is caught flagrante delicto, which shall immediately be notified to the President of the Supreme Court of Georgia.

Unless the President of the Supreme Court gives his/her consent to the arrest or detention, the arrested or detained judge shall immediately be released.

KOSOVO

Article 108: Kosovo Judicial Council

1. The Kosovo Judicial Council shall ensure the independence and impartiality of the judicial system.

2. The Kosovo Judicial Council is a fully independent institution in the performance of its functions. The Kosovo Judicial Council shall ensure that the Kosovo courts are independent, professional and impartial and fully reflect the multi-ethnic nature of Kosovo and follow the principles of gender equality. The

Kosovo Judicial Council shall give preference in the appointment of judges to members of Communities that are underrepresented in the judiciary as provided by law.

- 3.** The Kosovo Judicial Council is responsible for recruiting and proposing candidates for appointment and reappointment to judicial office. The Kosovo Judicial Council is also responsible for transfer and disciplinary proceedings of judges.
- 4.** Proposals for appointments of judges must be made on the basis of an open appointment process, on the basis of the merit of the candidates, and the proposals shall reflect principles of gender equality and the ethnic composition of the territorial jurisdiction of the respective court. All candidates must fulfill the selection criteria provided by law.
- 5.** The Kosovo Judicial Council is responsible for conducting judicial inspections, judicial administration, developing court rules in accordance with the law, hiring and supervising court administrators, developing and overseeing the budget of the judiciary, determining the number of judges in each jurisdiction and making recommendations for the establishment of new courts. New courts shall be established according to law.
- 6.** The Kosovo Judicial Council shall be composed of thirteen (13) members, all of whom shall possess relevant professional qualifications and expertise. Members shall be elected for a term of five (5) years and shall be chosen in the following manner:
 - 1.** five (5) members shall be judges elected by the members of the judiciary;
 - 2.** four (4) members shall be elected by deputies of the Assembly holding seats attributed during the general distribution of seats; at least two (2) of the four (4) must be judges and one (1) must be a member of the Kosovo Chamber of Advocates;
 - 3.** two (2) members shall be elected by the deputies of the Assembly holding reserved or guaranteed seats for the Kosovo Serb community and at least one of the two must be a judge;
 - 4.** two (2) members shall be elected by the deputies of the Assembly holding reserved or guaranteed seats for other Communities and at least one of the two must be a judge.
- 5.** Incompatibilities with membership on the Kosovo Judicial Council shall be regulated by law.
- 7.** The Kosovo Judicial Council elects from its members a Chair and Vice Chair each for a term of three (3) years. Election to these offices does not extend the mandate of the members of the Kosovo Judicial Council.
- 8.** The Chair of the Kosovo Judicial Council addresses the Assembly of the Republic of Kosovo at least once a year regarding the Judicial System.
- 9.** Candidates for judicial positions that are reserved for members of Communities that are not in the majority in Kosovo may only be recommended for appointment by the majority of members of the Council elected by Assembly deputies holding seats reserved or guaranteed for members of communities that are not in the majority in Kosovo. If this group of Council members fails to recommend a candidate for a judicial position in two consecutive sessions of the Council, any Council member may recommend a candidate for that position.
- 10.** Candidates for judicial positions within basic courts, the jurisdiction of which exclusively includes the territory of one or more municipalities in which the majority of the population belongs to the Kosovo Serb community, may only be recommended for appointment by the two members of the Council elected by Assembly deputies holding seats reserved or guaranteed for the Serb Community in the Republic of Kosovo acting jointly and unanimously. If these two (2) members fail to recommend a judicial candidate for two consecutive sessions of the Kosovo Judicial Council, any Kosovo Judicial Council member may recommend a candidate for that position.

COMMENTARY

By way of summary of existing standards, in general, a judicial council should be composed of a majority of judges and have duties with respect to the appointment, transfer, promotion, discipline and removal of judges. It is generally desirable for these councils to include members from outside the judiciary to avoid a kind of “corporatist” bias by members of the judiciary, and in matters of discipline transfer or removal, the Minister of Justice and the Public Prosecutor, in those cases where they are members, should recuse themselves in the interest of protecting judicial independence. This latter feature is designed to insure that these executive officers will have no means of punishing members of the judiciary for decisions that they do not like.

In terms of the powers exercised by judicial council, it is important to note that they (including Ukraine’s constitution) all play a role in the appointment of judges. (Georgia has no judicial council). Otherwise, they have various powers. The current Ukraine Constitution provides for powers relating to dismissal and discipline, including the discipline of prosecutors. The Constitution of Moldova grants additional powers relating to, transfer, removal and discipline of judges. The Constitution of Romania also grants powers relating to discipline, including the discipline of prosecutors. The Constitution of Poland says nothing about the judicial council’s powers (presumably this will be covered by statute). The Constitution of Lithuania also grants the council powers relating to promotion, transfer, and dismissal of judges (not prosecutors.) Finally, the Constitution of Kosovo grants more powers to the council than any other of the constitutions studied. In addition to granting power in relation to appointment, it also grants a role to the council in judicial inspection, court administration (including the hiring of administrators, the determination of the number of judges in each court, and providing recommendations for the establishment of new courts. The Constitution of Romania is the only one which requires the Minister of Justice, the President of the High Court of Cassation, and the Attorney General to recuse themselves in matters of discipline or removal.

In terms of the composition of the various councils, the constitutions of Romania, Poland, and Kosovo provide for a majority of judges on their judicial councils. Where the other constitutions provide for councils, (including the current Constitution of Ukraine) the existence of a majority of judges on these councils depends upon the choice of the institutions empowered to appoint members to them. . (For example, where Parliament is authorized to appoint members, they could appoint judges bringing the number of judges to a majority.)

The Constitution of Poland has a unique and interesting feature in that Article 187 of that Constitution gives the Council in Poland direct access to the Constitutional Court to challenge any law or other normative act that might impact the independence of the judiciary. In addition, Romania requires that the Minister of Justice, the President of the High Court of Cassation (Supreme Court), and the Public Prosecutor, who are members of the judicial council there, must recuse themselves when the council is dealing with matters of discipline.

10. ROLE OF HIGH QUALIFICATION COMMISSION REGARDING RECOMMENDATIONS FOR CANDIDATES FOR JUDGE AND TRANSFER OF JUDGES

GUIDELINES

INTERNATIONAL

No international standards.

REGIONAL

European Charter on the Statute of Judges

2.1 Judicial candidates must be selected and recruited by an independent body or panel. The Charter does not require that the latter be the independent authority referred to in paragraph 1.3, which means, for instance, that examination or selection panels can be used, provided they are independent. In practice, the selection procedure is often separate from the actual appointment procedure. It is important to specify the particular safeguards accompanying the selection procedure. The choice made by the selection body must be based on criteria relevant to the nature of the duties to be discharged.

The main aim must be to evaluate the candidate's ability to assess independently cases heard by judges, which implies independent thinking. The ability to show impartiality in the exercise of judicial functions is also an essential element. The ability to apply the law refers both to knowledge of the law and the capacity to put it into practice, which are two different things. The selection body must also ensure that the candidate's conduct as a judge will be based on respect for human dignity, which is vital in encounters between persons in positions of power and the litigants, who are often people in great difficulties.

Lastly, selection must not be based on discriminatory criteria relating to gender, ethnic or social origin, philosophical or political opinions or religious convictions.

Venice Commission Opinion No. 747/2013 (CDL-AD(2013)034)

35. Ideally, in order to ensure a coherent approach to judicial careers, the HQC should become part of the HJC, possibly as a chamber in charge of the selection of candidates for judicial positions. Admittedly there is no European standard that judicial appointments and careers should be dealt with by a single body, however.

CONSTITUTIONAL COMPARISON

UKRAINE [CURRENT]

Article 127

A citizen of Ukraine, not younger than the age of twenty-five, who has a higher legal education and has work experience in the sphere of law for no less than three years, has resided in Ukraine for no less than ten years and has command of the state language, may be recommended for the office of judge by the Qualification Commission of Judges.

Persons with professional training in issues of jurisdiction of specialised courts may be judges of these courts. These judges administer justice only as members of a collegium of judges.

Additional requirements for certain categories of judges in terms of experience, age and their

professional level are established by law.

Protection of the professional interests of judges is exercised by the procedure established by law.

OTHER CONSTITUTIONS

Comparable commissions do not exist under other regional constitutions.

COMMENTARY

The current Ukraine constitution is the only one of the constitutions studied that expressly states – in Article 127 – that appointment entails a two-tier process, actually citing the Qualification Commission. Nevertheless, the European Charter for Judges states that “in practice, the selection procedure is often separate from the actual appointment procedure.” Since the rule expressly contemplates a two-tier process, it would seem that the role of the HQC in Ukraine is valid as long as each of the institutions involved is independent.

The Venice Commission commented on the current Constitution of Ukraine in its recent opinion, cited above, stating specifically that “ Ideally, in order to ensure a coherent approach to judicial careers, the HQC should become part of the HJC, possibly as a chamber in charge of the selection of candidates for judicial positions. Admittedly there is no European standard that judicial appointments and careers should be dealt with by a single body, however.”

11. APPOINTMENT AND TRANSFER OF ORDINARY JUDGES

GUIDELINES

INTERNATIONAL

United Nations Basic Principles on the Independence of the Judiciary

Qualifications, selection and training

10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.

Conditions of service and tenure

11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.

13. Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.

14. The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration.

The Universal Charter of the Judge

Art. 8 - Security of office

A judge cannot be transferred, suspended or removed from office unless it is provided for by law and then only by decision in the proper disciplinary procedure.

A judge must be appointed for life or for such other period and conditions, that the judicial independence is not endangered.

Art. 9 - Appointment

The selection and each appointment of a judge must be carried out according to objective and transparent criteria based on proper professional qualification. Where this is not ensured in other ways, that are rooted in established and proven tradition, selection should be carried out by an independent body, that includes substantial judicial representation.

Art. 11 - Administration and disciplinary action

Where this is not ensured in other ways that are rooted in established and proven tradition, judicial administration and disciplinary action should be carried out by independent bodies that include substantial judicial representation.

REGIONAL

The European Charter on the Statute of Judges

1.3. In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary.

2. SELECTION, RECRUITMENT, INITIAL TRAINING

2.1. The rules of the statute relating to the selection and recruitment of judges by an independent body or panel, base the choice of candidates on their ability to assess freely and impartially the legal matters which will be referred to them, and to apply the law to them with respect for individual dignity. The statute excludes any candidate being ruled out by reason only of their sex, or ethnic or social origin, or by reason of their philosophical and political opinions or religious convictions.

2.2. The statute makes provision for the conditions which guarantee, by requirements linked to educational qualifications or previous experience, the ability specifically to discharge judicial duties.

3. APPOINTMENT AND IRREMOVABILITY

3.1. The decision to appoint a selected candidate as a judge, and to assign him or her to a tribunal, are taken by the independent authority referred to at paragraph 1.3 hereof or on its proposal, or its recommendation or with its agreement or following its opinion.

3.2. The statute establishes the circumstances in which a candidate's previous activities, or those engaged in by his or her close relations, may, by reason of the legitimate and objective doubts to which they give rise as to the impartiality and independence of the candidate concerned, constitute an impediment to his or her appointment to a court.

3.4. A judge holding office at a court may not in principle be appointed to another judicial office or assigned elsewhere, even by way of promotion, without having freely consented thereto. An exception to this principle is permitted only in the case where transfer is provided for and has been pronounced by way of a disciplinary sanction, in the case of a lawful alteration of the court system, and in the case of a temporary assignment to reinforce a neighbouring court, the maximum duration of such assignment being strictly limited by the statute, without prejudice to the application of the provisions at paragraph 1.4 hereof.

Explanatory Memorandum

2. SELECTION, RECRUITMENT AND INITIAL TRAINING

2.1 Judicial candidates must be selected and recruited by an independent body or panel. The Charter does not require that the latter be the independent authority referred to in paragraph 1.3, which means, for instance, that examination or selection panels can be used, provided they are independent. In practice, the selection procedure is often separate from the actual appointment procedure. It is important to specify the particular safeguards accompanying the selection procedure. The choice made by the selection body must be based on criteria relevant to the nature of the duties to be discharged.

The main aim must be to evaluate the candidate's ability to assess independently cases heard by judges, which implies independent thinking. The ability to show impartiality in the exercise of judicial functions is also an essential element. The ability to apply the law refers both to knowledge of the law and the capacity to put it into practice, which are two different things. The selection body must also ensure that the candidate's conduct as a judge will be based on respect for human dignity, which is vital in encounters between persons in positions of power and the litigants, who are often people in great difficulties.

Lastly, selection must not be based on discriminatory criteria relating to gender, ethnic or social origin, philosophical or political opinions or religious convictions.

3.4. A judge holding office at a court may not in principle be appointed to another judicial office or assigned elsewhere, even by way of promotion, without having freely consented thereto. An exception to this principle is permitted only in the case where transfer is provided for and has been pronounced by way of a disciplinary sanction, in the case of a lawful alteration of the court system, and in the case of a temporary assignment to reinforce a neighbouring court,

the maximum duration of such assignment being strictly limited by the statute, without prejudice to the application of the provisions at paragraph 1.4 hereof.

Venice Commission, Recommendation R. (1994)

2. Appointed judges may not be permanently removed from office without valid reasons until mandatory retirement. Such reasons, which should be defined in precise terms by the law, could apply in countries where the judge is elected for a certain period, or may relate to incapacity to perform judicial functions, commission of criminal offences or serious infringements of disciplinary rules.

Venice Commission Opinion No. 403/2006 (CDL_AD(2007)028)

17. To the extent that the independence or autonomy of the judicial council is ensured, the direct appointment of judges by the judicial council is clearly a valid model.

25. The Venice Commission is of the opinion that a judicial council should have a decisive influence on the appointment and promotion of judges and (maybe via a disciplinary board set up within the council) on disciplinary measures against them. An appeal against disciplinary measures to an independent court should be available.

Venice Commission CDL-AD(2013)034 (Commenting on Proposal 13 to amend the current Ukrainian Constitution)

38. The list of grounds for which discrimination is prohibited does not include sexual orientation, which should be added.

CONSTITUTIONAL COMPARISON

UKRAINE [CURRENT]

Article 85

The authority of the Verkhovna Rada of Ukraine comprises:

- 27.** electing judges for permanent terms;

Article 106

The President of Ukraine:

- 23.** establishes courts by the procedure determined by law;

Article 128

The first appointment of a professional judge to office for a five-year term is made by the President of Ukraine. All other judges, except the judges of the Constitutional Court of Ukraine, are elected by the Verkhovna Rada of Ukraine **for permanent terms by the procedure established by law.**

The Chairman of the Supreme Court of Ukraine is elected to office and dismissed from office by the Plenary Assembly of the Supreme Court of Ukraine by secret ballot, by the procedure established by law.

CHAPTER XII. CONSTITUTIONAL COURT OF UKRAINE

Article 148

The Constitutional Court of Ukraine is composed of eighteen judges of the Constitutional Court of Ukraine.

The President of Ukraine, the Verkhovna Rada of Ukraine and the Congress of Judges of Ukraine each appoint six judges to the Constitutional Court of Ukraine.

The Chairman of the Constitutional Court of Ukraine is elected by secret ballot only for one three-year term at a special plenary meeting of the Constitutional Court of Ukraine from among the judges of the Constitutional Court of Ukraine.

MOLDOVA

Article 116. Status of judges

2. Judges sitting in the courts of law shall be appointed, under the law, **by the President of the Republic of Moldova upon proposal submitted by the Superior Council of Magistrates.** Judges who successfully passed the contest shall be firstly appointed for a 5-year term of office. After the expiration of the 5-year term of office, the judges shall be appointed to this position until reaching the age limit fixed under the law.
3. The Presidents, Vice-Presidents and judges of the Supreme Court of Justice shall be **appointed by Parliament following a proposal submitted by the Superior Council of Magistrates.** They must have a working tenure as judge of at least 10 years.
4. Judges shall be promoted and transferred only at their own consent.

TITLE V. CONSTITUTIONAL COURT

Article 136. STRUCTURE

1. The Constitutional Court shall consist of 6 judges appointed for a 6-year term of office.
2. Two judges shall be appointed by the Parliament, two - by the Government and the remaining two - by the Superior Council of Magistrates.
3. The judges of the Constitutional Court shall elect its President by secret ballot.

ROMANIA

SECTION 3. THE HIGH COUNCIL OF THE JUDICIARY

Article 125. Rules Governing Judges

1. Judges appointed by the President of Romania shall be irremovable in accordance with the law.

2. The proposals for appointment of judges, their promotion and transfer as well as sanctions against judges shall be within the exclusive competence of the High Council of the Judiciary, under the terms of its organic law.
3. The position of judge is incompatible with any other public or private office, with the exception of teaching positions in higher education.

Article 134. Duties

1. **The High Council of the Judiciary proposes to the President of Romania the appointment of judges and prosecutors**, with the exception of trainees, in accordance with the law.
4. The High Council of the Judiciary shall also perform the other duties enumerated in its organic law, in order to fulfill its role as guarantor of the independence of the judiciary.

TITLE V. THE CONSTITUTIONAL COURT

Article 142. STRUCTURE

2. The Constitutional Court is composed of 9 justices, **appointed** for a nine-year term, which cannot be extended or renewed.
3. **Three justices are appointed by the Chamber of Deputies, three by the Senate, and three by the President of Romania.**
4. The members of the Constitutional Court elect a president by secret ballot for a three-year term.
5. Every three years one-third of the membership of the Constitutional Court is renewed in accordance with the terms of the Court's organic law.

POLAND

CHAPTER VIII. COURTS AND TRIBUNALS

Article 179

Judges shall be **appointed for an indefinite period** by the President of the Republic on the motion of the National Council of the Judiciary.

Article 180

2. Recall of a judge from office, suspension from office, **removal to another bench or position against his will, may only occur by virtue of a court judgment and only in those instances prescribed in statute.**
5. Where there has been a reorganization of the court system or changes to the boundaries of court districts, a judge may be allocated to another court or retired with maintenance of his full remuneration.
3. The First President of the Supreme Court shall be appointed by the President of the Republic for a 6-year term of office from amongst candidates proposed by the General Assembly of the Judges of the Supreme Court.

Article 184

The Chief Administrative Court and other administrative courts shall exercise, to the extent specified by statute, control over the performance of public administration. Such control shall

also extend to judgments on the conformity to statute of resolutions of organs of local self-government and normative acts of territorial organs of government administration.

Article 185

The President of the Chief Administrative Court shall be **appointed** by the President of the Republic for a 6-year term of office from amongst candidates proposed by the General Assembly of the Judges of the Chief Administrative Court.

Article 194

1. The Constitutional Tribunal shall be composed of 15 judges **chosen individually by the Sejm** for a term of office of 9 years from amongst persons distinguished by their knowledge of the law. No person may be chosen for more than one term of office.
2. The President and Vice-President of the Constitutional Tribunal shall be appointed by the President of the Republic from amongst candidates proposed by the General Assembly of the Judges of the Constitutional Tribunal.

THE TRIBUNAL OF STATE

Article 199

1. The Tribunal of State shall be composed of a chairperson, two deputy chairpersons and 16 members **chosen by the Sejm** for the current term of office of the Sejm from amongst those who are not Deputies or Senators. The deputy chairpersons of the Tribunal and at least one half of the members of the Tribunal shall possess the qualifications required to hold the office of judge.
2. **The First President of the Supreme Court shall be chairperson of the Tribunal of State.**

LITHUANIA

Article 103

The Constitutional Court shall consist of 9 justices, each **appointed** for a single nine-year term of office. Every three years, one-third of the Constitutional Court shall be reconstituted. **The Seimas shall appoint** candidates for justices of the Constitutional Court from the candidates, three each submitted by the President of the Republic, the President of the Seimas, and the President of the Supreme Court, and appoint them as justices.

The Seimas shall appoint the President of the Constitutional Court from among its justices upon the submission by the President of the Republic.

Citizens of the Republic of Lithuania who have an impeccable reputation, who have higher education in law, and who have not less than a 10-year work record in the field of law or in a branch of science and education as a lawyer, may be appointed as justices of the Constitutional Court.

Article 112

Justices of the Supreme Court as well as its President chosen from among them shall be appointed and dismissed by the Seimas upon the submission of the President of the Republic.

Judges of the Court of Appeal as well as its President chosen from among them shall be appointed by the President of the Republic upon the assent of the Seimas.

Judges and presidents of local, regional, and specialised courts shall be appointed, and their places of work shall be changed by the President of the Republic.

A special institution of judges provided for by law shall advise the President of the Republic on the appointment, promotion, transfer of judges, or their dismissal from office.

GEORGIA

Article 88

2. The Constitutional Court of Georgia shall consist of nine judges – the members of the Constitutional Court. Three members of the Constitutional Court shall be **appointed by the President of Georgia, three members shall be elected by the Parliament by not less than three fifths of the number of the members of the Parliament on the current nominal list, three members shall be appointed by the Supreme Court.** The term of office of the members of the Constitutional Court shall be ten years. The **Constitutional Court shall elect the President of the Constitutional Court among its members** for a period of five years. The President shall not be re-elected.

Article 90

2. The President and the judges of the Supreme Court of Georgia shall be elected for a period of not less than ten years by the Parliament by the majority of the number of the members of Parliament on the current nominal list upon the submission of the President of Georgia.

KOSOVO

Article 84. Competencies of the President

The President of the Republic of Kosovo:

- 15. appoints and dismisses the President of the Supreme Court of the Republic of Kosovo upon the proposal of the Kosovo Judicial Council;
- 16. appoints and dismisses judges of the Republic of Kosovo upon the proposal of the Kosovo Judicial Council;
- 19. appoints judges to the Constitutional Court upon the proposal of the Assembly;

Article 103. Organization and Jurisdiction of the Courts

- 1. Organization, functioning and jurisdiction of the Supreme Court and other courts shall be regulated by law.
- 3. At least fifteen percent (15%) of the judges of the Supreme Court, but not fewer than three (3) judges, shall be from Communities that are not in the majority in Kosovo.
- 4. The President of the Supreme Court of Kosovo shall be appointed and dismissed by the President of the Republic of Kosovo from among the judges of the Supreme Court for a non-renewable term of seven (7) years upon proposal by the Kosovo Judicial Council for the appointment or dismissal.
- 5. Presidents of all other courts shall be appointed in the manner provided by law.

6. At least fifteen percent (15%) of the judges from any other court established with appeal jurisdiction, but not fewer than two (2) judges, shall be from Communities that are not in the majority in Kosovo.

Article 104. Appointment and Removal of Judges

1. The President of the Republic of Kosovo shall appoint, reappoint and dismiss judges upon the proposal of the Kosovo Judicial Council.
2. The composition of the judiciary shall reflect the ethnic diversity of Kosovo and internationally recognized principles of gender equality.
3. The composition of the courts shall reflect the ethnic composition of the territorial jurisdiction of the respective court. Before making a proposal for appointment or reappointment, the Kosovo Judicial Council consults with the respective court.
4. Judges may be removed from office upon conviction of a serious criminal offense or for serious neglect of duties.
5. A judge has the right to directly appeal a decision of dismissal to the Kosovo Supreme Court.

Article 105. Mandate and Reappointment

1. The initial mandate for judges shall be three years. The reappointment mandate is permanent until the retirement age as determined by law or unless removed in accordance with law.
2. The criteria and procedures to reappoint a judge shall be determined by the Kosovo Judicial Council and they may be different in degree from the criteria used for the removal of judges.

Article 108. Kosovo Judicial Council

3. The **Kosovo Judicial Council** is responsible for recruiting and proposing candidates for **appointment and reappointment** to judicial office. The Kosovo Judicial Council is also responsible for transfer and disciplinary proceedings of judges.
4. Proposals for appointments of judges must be made on the basis of an open appointment process, on the basis of the merit of the candidates, and the proposals shall reflect principles of gender equality and the ethnic composition of the territorial jurisdiction of the respective court. All candidates must fulfill the selection criteria provided by law.
9. Candidates for judicial positions that are reserved for members of Communities that are not in the majority in Kosovo may only be recommended for appointment by the majority of members of the Council elected by Assembly deputies holding seats reserved or guaranteed for members of communities that are not in the majority in Kosovo. If this group of Council members fails to recommend a candidate for a judicial position in two consecutive sessions of the Council, any Council member may recommend a candidate for that position.
10. Candidates for judicial positions within basic courts, the jurisdiction of which exclusively includes the territory of one or more municipalities in which the majority of the population belongs to the Kosovo Serb community, may only be recommended for appointment by the two members of the Council elected by Assembly deputies holding seats reserved or guaranteed for the Serb Community in the Republic of Kosovo acting jointly and unanimously. If these two (2) members fail to recommend a judicial candidate for two consecutive sessions of the Kosovo Judicial Council, any Kosovo Judicial Council member may recommend a candidate for that position.

Article 114. Composition and Mandate of the Constitutional Court

1. The Constitutional Court shall be composed of nine (9) judges who shall be distinguished jurists of the highest moral character, with not less than ten (10) years of relevant professional experience. Other relevant qualifications shall be provided by law. Principles of gender equality shall be respected.
2. Judges shall be appointed by the President of the Republic of Kosovo upon the proposal of the Assembly and shall serve for a non-renewable mandate of nine (9) years.
3. The decision to propose seven (7) judges requires a two thirds (2/3) majority of the deputies of the Assembly present and voting. The decision on the proposals of the other two (2) judges shall require the majority vote of the deputies of the Assembly present and voting, but only upon the consent of the majority of the deputies of the Assembly holding seats reserved or guaranteed for representatives of the Communities not in the majority in Kosovo.
4. If the mandate of a judge ends before the end of the regular mandate, the appointment of the replacement judge shall be made in compliance with this article for a full mandate without the right to re-appointment.
5. The President and Deputy President of the Constitutional Court shall be elected from the judges of the Constitutional Court by a secret ballot of the judges of the Court for a term of three (3) years. Election to these offices shall not extend the regular mandate of the judge.

COMMENTARY

Appointment

The standards require that judges be appointed either directly by an independent authority composed of a majority of judges or upon their proposal or recommendation. An appointment process conducted by a judicial council with the required majority would comply with these standards.

The standards also set forth certain basic principles which require that the selections for judicial appointment be made upon consideration of objective criteria based on merit with regard to the following:

- Ability to assess legal matters freely and impartially
- Educational qualifications
- Previous experience
- Knowledge of the law and the ability to put it into practice
- Respect for human dignity
- Integrity and efficiency
- Success on a competitive examination (which must be considered along with the other factors)

In addition, the standards forbid discrimination in the selection process on the basis of sex, sexual orientation, ethnic or social origin, or philosophical and political opinions or religious convictions.

The Constitutions examined do not say much about standards for appointment. The current Ukrainian Constitution provides more detail than the others, including age, education, and residency requirements. The Constitutions of Romania, Poland and Georgia say nothing on the

subject. The Moldova Constitution is the only one which requires success on a competitive examination (only for appointment during a probationary period). The Constitution of Poland requires only that candidates be distinguished by their knowledge of the law, and the Constitution of Kosovo requires only that selection be based upon merit, although it does forbid discrimination on the basis of gender and actually requires the consideration of ethnicity in assigning judges to particular territorial jurisdictions.

An examination of the constitutions with a view as to who conducts appointments reveals little uniformity among them. The current Ukraine Constitution provides for appointment of judges during a probationary 5 year period by the President of the Republic and assigns the appointment of permanent judges to the Parliament. The constitutions of Romania and Kosovo provide for appointment by the President of the Republic upon proposal by the judicial council. The Lithuanian Constitution sets out that same procedure for appointment to the local, regional and special courts. However, under its terms, the Parliament elects the members of the Supreme Court upon proposal by the President. The Constitution of Moldova provides for the same procedure for appointment to the lower courts but members of the Supreme Court are appointed by Parliament upon proposal by the judicial council. The Constitution of Georgia says nothing about appointment to the lower courts but, under that Constitution, the Parliament elects the judges of the Supreme Court from a list of candidates submitted to them by the President of the Republic. In Poland the Constitution provides that judges of the Supreme Court are chosen by Parliament upon proposal by the President, and the judges of the Court of Appeal are appointed by the President with the assent of the Parliament.

There is even less uniformity when it comes to the selection of judges for administrative positions within the courts. Under the current Ukrainian Constitution, Parliament elects the Chairman of the Supreme Court. That Constitution says nothing more about other administrative appointments. In Moldova Parliament chooses the President and Vice-Presidents of the Supreme Court. There is nothing at all on this subject in the Romanian Constitution. Under the Constitution of Poland, the President of the Republic appoints the President of the Supreme Court from a list of candidates submitted by the General Assembly of that Court. In Kosovo, the Constitution provides for appointment of the President of the Supreme Court by the President of the Republic from among the candidates proposed for appointment to that Court by the judicial council.

In addition, there are separate rules in the constitutions relating to appointment to the Constitutional Courts in these constitutions. There is little uniformity in this regard except for the fact that in general Parliament plays a significant role in the appointment of members of this court in most countries, and this is consistent with the practice of appointment to constitutional courts anywhere in the world. Under the current Ukraine constitution three members are appointed by the President of the Republic, three by the Parliament, and three by the Congress of Judges. In Moldova the Parliament, the Government, and the Judicial Council each appoint three. In Romania, the Chamber of Deputies, the Senate, and the President share the appointment power equally. In Poland, the Parliament alone has the power of appointment to this Court. In Lithuania, Parliament appoints the members from lists of candidates submitted by the President of the Republic, the President of Parliament, and the President of the Supreme Court. In Georgia, three members are appointed by the President of the Republic, three by a three fifths vote of the Parliament, and three by the Supreme Court. In Kosovo, the President appoints all of the

members of the Court upon proposal by Parliament.

It should be noted that the Constitution of Poland creates a special Tribunal of State with jurisdiction to try public officials. All 16 members of that court are appointed by the Parliament.

Transfer

The basic requirement of the European standards in this connection is that judges should not be transferred without their consent.

The Constitution of Poland is the only constitution considered which states this rule and provides that the transfer must be ordered by a court. It also provides for an exception to the consent rule in cases involving the reorganization of the courts. The Constitutions of Romania and Lithuania do not specifically require consent but simply state that transfer should be dealt with by the judicial council (where the rule would presumably apply).

12. ROLE OF PRESIDENT IN JUDICIAL APPOINTMENTS

GUIDELINES

INTERNATIONAL

International Association of Judicial Independence and World Peace Mt. Scopus Approved Revised International Standards of Judicial Independence [March 19, 2008]

2.4. Judicial appointments and promotions by the Executive are not inconsistent with judicial independence as long as they are in accordance with Principles 4.

REGIONAL

Venice Commission CDL-AD(2013)034 (Commenting on Proposal 13 to amend the current Ukrainian Constitution)

16. *A priori*, the Venice Commission has no objection against appointment of judges by the Head of State when the latter is bound by a proposal of the judicial council and acts in a ‘ceremonial’ way, only formalising the decision taken by the judicial council in substance.⁶ In such a setting, a situation where the President refuses to ratify a decision of the judicial council would be critical because it would *de facto* give the President a veto against decisions of the judicial council. In order to ensure that the President indeed only has a ceremonial role⁷, the Constitution could provide that proposals by the judicial council would enter into force directly, without the intervention of the President if the President does not enact them within a given period of time. Of course, direct appointment of judges by the judicial council avoids such complex safeguards.

CONSTITUTIONAL COMPARISON

UKRAINE [CURRENT]

Article 128

The first appointment of a professional judge to office for a five-year term is made by the President of Ukraine. All other judges, except the judges of the Constitutional Court of Ukraine, are elected by the Verkhovna Rada of Ukraine for permanent terms by the procedure established by law.

MOLDOVA

Article 116: Status of judges

1. Judges sitting in the courts of law shall be independent, impartial and irremovable under the law.
2. Judges sitting in the courts of law shall be appointed, under the law, by the President of the Republic of Moldova upon proposal submitted by the Superior Council of Magistrates. Judges who successfully passed the contest shall be firstly appointed for a 5-year term of office. After the expiration of the 5-year term of office, the judges shall be appointed to this position until reaching the age limit fixed under the law.
3. The Presidents, Vice-Presidents and judges of the Supreme Court of Justice shall be appointed by Parliament following a proposal submitted by the Superior Council of Magistrates. They must have a working tenure as judge of at least 10 years.

ROMANIA

Article 125: Rules Governing Judges

1. Judges appointed by the President of Romania shall be irremovable in accordance with the law.
2. The proposals for appointment of judges, their promotion and transfer as well as sanctions against judges shall be within the exclusive competence of the High Council of the Judiciary, under the terms of its organic law.

Article 134: Duties

1. The High Council of the Judiciary proposes to the President of Romania the appointment of judges and prosecutors, with the exception of trainees, in accordance with the law.

POLAND

Article 179

Judges shall be appointed for an indefinite period by the President of the Republic on the motion of the National Council of the Judiciary.

Article 187

4. The organizational structure, the scope of activity and procedures for work of the National Council of the Judiciary, as well as the manner of choosing its members, shall be specified by statute.

LITHUANIA

Article 112

Justices of the Supreme Court as well as its President chosen from among them shall be appointed and dismissed by the Seimas upon the submission of the President of the Republic.

Judges of the Court of Appeal as well as its President chosen from among them shall be appointed by the President of the Republic upon the assent of the Seimas.

Judges and presidents of local, regional, and specialised courts shall be appointed, and their places of work shall be changed by the President of the Republic.

A special institution of judges provided for by law shall advise the President of the Republic on the appointment, promotion, transfer of judges, or their dismissal from office.

GEORGIA

Article 86

1. A judge shall be a citizen of Georgia who has attained the age of 30, and has the higher legal education and at least five years experience in the practice of law.
2. A judge shall be designated on the position for a period of not less than ten years. The selection, appointment or dismissal procedure of a judge shall be determined by law.

Article 88

1. The Constitutional Court of Georgia shall exercise the judicial power by virtue of the constitutional legal proceedings.
2. The Constitutional Court of Georgia shall consist of nine judges – the members of the Constitutional Court. Three members of the Constitutional Court shall be appointed by the President of Georgia, three members shall be elected by the Parliament by not less than three fifths of the number of the members of the Parliament on the current nominal list, three members shall be appointed by the Supreme Court. The term of office of the members of the Constitutional Court shall be ten years. The Constitutional Court shall elect the President of the Constitutional Court among its members for a period of five years.

Article 90

1. In accordance with the established procedure the Supreme Court of Georgia shall supervise the administration of justice in the courts of general jurisdiction of Georgia, shall consider the cases as determined by law acting as a first instance court.
2. The President and the judges of the Supreme Court of Georgia shall be elected for a period of not less than ten years by the Parliament by the majority of the number of the members of Parliament on the current nominal list upon the submission of the President of Georgia.

KOSOVO

Article 104: Appointment and Removal of Judges

1. The President of the Republic of Kosovo shall appoint, reappoint and dismiss judges upon the proposal of the Kosovo Judicial Council.

Article 105: Mandate and Reappointment

1. The initial mandate for judges shall be three years. The reappointment mandate is permanent until the retirement age as determined by law or unless removed in accordance with law.
2. The criteria and procedures to reappoint a judge shall be determined by the Kosovo Judicial Council and they may be different in degree from the criteria used for the removal of judges.

COMMENTARY

Appointment by the President does not violate European standards as long as that procedure is a ceremonial confirmation of an appointment process by an independent body as described above in Chapter 10, above. Certainly, a ceremonial appointment by the President following an appointment decision by a judicial council would comply with this standard.

As noted in Chapter 10, there is little uniformity among the constitutions considered with respect to the involvement of the President in appointment procedures. However, the Constitutions of Romania and Kosovo do provide for a ceremonial appointment by the President following the decision of the judicial council. This procedure is also common in other parts of the world.

13. COMPETITIVE SELECTION OF JUDGES

GUIDELINES

INTERNATIONAL

United Nations Basic Principles on the Independence of the Judiciary

Qualifications, Selection and Training

10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.

The Universal Charter of the Judge (International Association of Judges)

Art. 9 - Appointment

The selection and each appointment of a judge must be carried out according to objective and transparent criteria based on proper professional qualification. Where this is not ensured in other ways, that are rooted in established and proven tradition, selection should be carried out by an independent body, that include substantial judicial representation.

REGIONAL

The European Charter on the Statute for Judges

2. SELECTION, RECRUITMENT, INITIAL TRAINING

2.1. The rules of the statute relating to the selection and recruitment of judges by an independent body or panel, base the choice of candidates on their ability to assess freely and impartially the legal matters which will be referred to them, and to apply the law to them with respect for individual dignity. The statute excludes any candidate being ruled out by reason only of their sex, or ethnic or social origin, or by reason of their philosophical and political opinions or religious convictions.

2.2. The statute makes provision for the conditions which guarantee, by requirements linked to educational qualifications or previous or previous experience, the ability specifically to discharge judicial duties.

Explanatory Memorandum

2. SELECTION, RECRUITMENT AND INITIAL TRAINING

2.1 Judicial candidates must be selected and recruited by an independent body or panel. The Charter does not require that the latter be the independent authority referred to in paragraph 1.3, which means, for instance, that examination or selection panels can be used, provided they are independent. In practice, the selection procedure is often separate from the actual appointment procedure. It is important to specify the particular safeguards accompanying the selection procedure.

The choice made by the selection body must be based on criteria relevant to the nature of the duties to be discharged.

The main aim must be to evaluate the candidate's ability to assess independently cases heard by judges, which implies independent thinking. The ability to show impartiality in the exercise of judicial functions is also an essential element. The ability to apply the law refers both to knowledge of the law and the capacity to put it into practice, which are two different things. The selection body must also ensure that the candidate's conduct as a judge will be based on respect for human dignity, which is vital in encounters between persons in positions of power and the litigants, who are often people in great difficulties.

Venice Commission CDL-AD(2013)034 (Commenting on Proposal 13 to amend the current Ukrainian Constitution.)

38. The list of grounds for which discrimination is prohibited does not include sexual orientation, which should be added.

Opinion No 1 of the Consultative Council of European Judges (2001)

22. In countries with a career judiciary, the initial appointment of career judges normally depends upon objective success in examination. The important issues seem to be (a) **whether**

competitive examination can suffice - should not personal qualities be assessed and practical skills be taught and examined? (b) whether an authority independent of the executive and legislature should be involved at this stage – in Austria, for example Personalsenates (composed of five judges) have a formal role in recommending promotions, but none in relation to appointments.

23. By contrast, where judges are or may be appointed from the ranks of experienced practitioners, examinations are unlikely to be relevant and practical skills and consultation with other persons having direct experience of the candidate are likely to be the basis of appointment.

24. In all the above situations, it is suggested that objective standards are required not merely to exclude political influence, but for other reasons, such as the risk of favouritism, conservatism and cronyism (or “cloning”), which exist if appointments are made in an unstructured way or on the basis of personal recommendations.

25. Any “objective criteria”, seeking to ensure that the selection and career of judges are “based on merit, having regard to qualifications, integrity, ability and efficiency”, are bound to be in general terms. Nonetheless, it is their actual content and effect in any particular state that is ultimately critical. **The CCJE recommended that the authorities responsible in member States for making and advising on appointments and promotions should now introduce, publish and give effect to objective criteria, with the aim of ensuring that the selection and career of judges are “based on merit, having regard to qualifications, integrity, ability and efficiency”.** Once this is done, those bodies or authorities responsible for any appointment or promotion will be obliged to act accordingly, and it will then at least be possible to scrutinize the content of the criteria adopted and their practical effect.

CONSTITUTIONAL COMPARISON

UKRAINE [CURRENT]

Article 127

A citizen of Ukraine, not younger than the age of twenty-five, who has a higher legal education and has work experience in the sphere of law for no less than three years, has resided in Ukraine for no less than ten years and has command of the state language, may be recommended for the office of judge by the Qualification Commission of Judges.

Persons with professional training in issues of jurisdiction of specialised courts may be judges of these courts. These judges administer justice only as members of a collegium of judges.

Additional requirements for certain categories of judges in terms of experience, age and their professional level are established by law.

Protection of the professional interests of judges is exercised by the procedure established by law.

MOLDOVA

Article 116. Status of Judges

1. Judges sitting in the courts of law shall be appointed, under the law, by the President of the Republic of Moldova upon proposal submitted by the Superior Council of Magistrates. **Judges who successfully passed the contest shall be firstly appointed for a 5-year term of office.** After the expiration of the 5-year term of office, the judges shall

be appointed to this position until reaching the age limit fixed under the law.

ROMANIA

Nothing in Constitution regarding competitive selection of judges.

POLAND

Article 194

1. The Constitutional Tribunal shall be composed of 15 judges chosen individually by the Sejm for a term of office of 9 years from amongst persons distinguished by their knowledge of the law. No person may be chosen for more than one term of office.

LITHUANIA

Nothing in Constitution regarding competitive selection of judges.

GEORGIA

Nothing in Constitution regarding competitive selection of judges.

KOSOVO

Article 108. Kosovo Judicial Council

4. Proposals for appointments of judges must be made on the basis of an open appointment process, on the basis of the merit of the candidates, and the proposals shall reflect principles of gender equality and the ethnic composition of the territorial jurisdiction of the respective court. All candidates must fulfill the selection criteria provided by law.

COMMENTARY

The applicable standards in this area are not entirely uniform. However, certain basic principles can be extracted from their terms taken collectively. In general, a principle can be deduced from these standards, which require objective criteria based on merit with regard to the following:

- Ability to assess legal matters freely and impartially
- Educational qualifications
- Previous experience
- Knowledge of the law and the ability to put it into practice
- Respect for human dignity
- Integrity and efficiency
- Success on a competitive examination (which must be considered along with the other factors)

In addition it is important to note that the standards, taken together, forbid discrimination in the selection process on the basis of her gender, sexual orientation, ethnic or social origin, or by reason of their philosophical and political opinions or religious convictions.

As a whole these standards require a competitive evaluation of individual candidates that take these factors into consideration.

The Constitutions examined do not say much on this topic. The current Ukrainian Constitution provides more detail than the others, including age, education, and residency requirements. The Constitutions of Romania, Poland and Georgia say nothing on the subject. The Moldova Constitution is the only one which requires success on a competitive examination (only for appointment during a probationary period). The Constitution of Poland requires only that candidates be distinguished by their knowledge of the law, and the Constitution of Kosovo requires only that selection be based upon merit, although it does forbid discrimination on the basis of gender and actually requires the consideration of ethnicity in assigning judges to particular territorial jurisdictions.

The apparent disconnect between the level of detail required in the regional standards may derive from the fact that many of these considerations might well be dealt with in statutory law with only the very general principles set out in the constitutions. However, neither the standards nor the practice reflected in these constitutions offer much guidance as to which requirements should be included in the constitution and which should be established by law.

14. PROBATIONARY PERIOD FOR JUDGES

GUIDELINES

INTERNATIONAL

United Nations Basic Principles on the Independence of the Judiciary

Conditions of service and tenure

11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

REGIONAL

The European Charter on the Statute of Judges

3.3. Where the recruitment procedure provides for a trial period, necessarily short, after nomination to the position of judge but before confirmation on a permanent basis, or where recruitment is made for a limited period capable of renewal, the decision not to make a permanent appointment or not to renew, may only be taken by the independent authority referred to at paragraph 1.3 hereof, or on its proposal, or its recommendation or with its agreement or following its opinion. The provisions at point 1.4 hereof are also applicable to an individual

subject to a trial period.

Opinion No 1 (2001) of the Consultative Council of European Judges (Recommendation R)

53. The CCJE considered that when tenure is provisional or limited, the body responsible for the objectivity and the transparency of the method of appointment or re-appointment as a full-time judge are of especial importance (see also paragraph 3.3 of the European Charter on the Statute of Judges.)

Venice Commission Opinion on Proposals Amending the Draft Law on the Amendments to the Constitution to Strengthen the Independence of Judges of Ukraine [2013]

38. The European Charter on the statute for judges states as follows “Clearly the existence of probationary periods or renewal requirements presents difficulties if not dangers from the angle of the independence and impartiality of the judge in question, who is hoping to be established in post or to have his or her contract renewed”.

39. The Universal Declaration on the Independence of Justice, adopted in Montreal in June 1983 by the World Conference on the Independence of Justice states: “The appointment of temporary judges and the appointment of judges for probationary periods is inconsistent with judicial independence. Where such appointments exist, they should be phased out gradually”.

40. The Venice Commission considers that setting probationary periods can undermine the independence of judges, since they might feel under pressure to decide cases in a particular way: “A decision of the Appeal Court of the High Court of Justiciary of Scotland (Starr v Ruxton, [2000] H.R.L.R 191; see also Millar v Dickson [2001] H.R.L.R 1401) illustrates the sort of difficulties that can arise. In that case the Scottish court held that the guarantee of trial before an independent tribunal in Article 6(1) of the European Convention on Human Rights was not satisfied by a criminal trial before a temporary sheriff who was appointed for a period of one year and was subject to discretion in the executive not to reappoint him. The case does not perhaps go so far as to suggest that a temporary or removable judge could in no circumstances be an independent tribunal within the meaning of the Convention but it certainly points to the desirability of ensuring that a temporary judge is guaranteed permanent appointment except in circumstances which would have justified removal from office in the case of a permanent judge. Otherwise he or she cannot be regarded as truly independent.”

41. This should not be interpreted as excluding all possibilities for establishing temporary judges. In countries with relatively new judicial systems there might be a practical need to first ascertain whether a judge is really able to carry out his or her functions effectively before permanent appointment. If probationary appointments are considered indispensable, a “refusal to confirm the judge in office should be made according to objective criteria and with the same procedural safeguards as apply where a judge is to be removed from office.”

42. The main idea is to exclude the factors that could challenge the impartiality of judges: “despite the laudable aim of ensuring high standards through a system of evaluation, it is notoriously difficult to reconcile the independence of the judge with a system of performance

appraisal. If one must choose between the two, judicial independence is the crucial value.”

43. In order to reconcile the need of probation / evaluation with the independence of judges, it should be pointed out that some countries like Austria have established a system whereby candidate judges are being evaluated during a probationary period during which they can assist in the preparation of judgements but they cannot yet take judicial decisions which are reserved to permanent judges. Venice Commission, Opinion on Draft Constitutional Amendments concerning the Reform of the Judicial System in “the Former Yugoslav Republic of Macedonia”, CDL-AD(2005)038, para. 23.

CONSTITUTIONAL COMPARISON

UKRAINE [CURRENT]

Article 128

The first appointment of a professional judge to office for a five-year term is made by the President of Ukraine. All other judges, except the judges of the Constitutional Court of Ukraine, are elected by the Verkhovna Rada of Ukraine for permanent terms by the procedure established by law.

MOLDOVA

Article 116: Status of judges

1. Judges sitting in the courts of law shall be independent, impartial and irremovable under the law.

2. Judges sitting in the courts of law shall be appointed, under the law, by the President of the Republic of Moldova upon proposal submitted by the Superior Council of Magistrates. Judges who successfully passed the contest shall be firstly appointed for a 5-year term of office. After the expiration of the 5-year term of office, the judges shall be appointed to this position until reaching the age limit fixed under the law.

ROMANIA

Nothing regarding probationary periods for judges.

POLAND

Nothing regarding probationary periods for judges.

LITHUANIA

Nothing regarding probationary period for judges

GEORGIA

Nothing regarding probationary periods for judges.

KOSOVO

Article 105: Mandate and Reappointment

- 1.** The initial mandate for judges shall be three years. The reappointment mandate is permanent until the retirement age as determined by law or unless removed in accordance with law.
- 2.** The criteria and procedures to reappoint a judge shall be determined by the Kosovo Judicial Council and they may be different in degree from the criteria used for the removal of judges.

COMMENTARY

The only international standard relating to this subject is contained in the Montreal Declaration which is referenced in the Venice Commission Opinion No. 747. However, that declaration was primarily focused on standards for judges operating in international courts. Nevertheless, the reasoning in that declaration is consistent with that found in the European standards. The concern is that a judge acting alone in a probationary period may be excessively influenced during the probationary period by a desire to please the authority who will consider that judge for a permanent position. Nevertheless, the European standards do not forbid the practice but merely discourage its use and recommend that probationary periods should be short.

The current Constitution of Ukraine and the Constitutions of Moldova and Kosovo all provide for probationary periods. The Constitutions of Moldova and Ukraine require a 5 year probationary period, while the period in Kosovo is three years. The concern which is expressed in the European standards would seem to be allayed by the fact that in each of these cases the judicial council plays the predominant role in the permanent appointment. Nevertheless, the question remains as to whether a five year period may be considered too long.

15. PERMANENT TENURE FOR JUDGES AT CONCLUSION OF PROBATIONARY PERIOD

GUIDELINES

INTERNATIONAL

United Nations Basic Principles on the Independence of the Judiciary

Conditions of service and tenure

- 12.** Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.

International Association of Judicial Independence and World Peace Mt. Scopus Approved Revised International Standards of Judicial Independence [Approved March 19, 2008]

4.3. Judicial appointments should generally be for life, subject to removal for cause and compulsory retirement at an age fixed by law at the date of appointment.

The Universal Charter of the Judge

Art. 8 - Security of office

A judge cannot be transferred, suspended or removed from office unless it is provided for by law and then only by decision in the proper disciplinary procedure.

A judge must be appointed for life or for such other period and conditions, that the judicial independence is not endangered.

REGIONAL

The European Charter on the Statute of Judges

3.3. Where the recruitment procedure provides for a trial period, necessarily short, after nomination to the position of judge but before confirmation on a permanent basis, or where recruitment is made for a limited period capable of renewal, the decision not to make a permanent appointment or not to renew, may only be taken by the independent authority referred to at paragraph 1.3 hereof, or on its proposal, or its recommendation or with its agreement or following its opinion. The provisions at point 1.4 hereof are also applicable to an individual subject to a trial period.

CONSTITUTIONAL COMPARISON

UKRAINE [CURRENT]

Article 126

Judges hold office for permanent terms, except judges of the Constitutional Court of Ukraine, and judges appointed to the office of judge for the first time.

Article 128

The first appointment of a professional judge to office for a five-year term is made by the President of Ukraine. All other judges, except the judges of the Constitutional Court of Ukraine, are elected by the Verkhovna Rada of Ukraine for permanent terms by the procedure established by law.

The Chairman of the Supreme Court of Ukraine is elected to office and dismissed from office by the Plenary Assembly of the Supreme Court of Ukraine by secret ballot, by the procedure established by law.

MOLDOVA

Article 116: Status of judges

1. Judges sitting in the courts of law shall be independent, impartial and irremovable under the law.

2. Judges sitting in the courts of law shall be appointed, under the law, by the President of the Republic of Moldova upon proposal submitted by the Superior Council of Magistrates. Judges who successfully passed the contest shall be firstly appointed for a 5-year term of office. After the expiration of the 5-year term of office, the judges shall be appointed to this position until reaching the age limit fixed under the law.

ROMANIA

No language regarding permanent appointment.

POLAND

Article 179

Judges shall be appointed for an indefinite period by the President of the Republic on the motion of the National Council of the Judiciary.

LITHUANIA

No language regarding permanent appointment.

GEORGIA

Article 86

2. A judge shall be designated on the position for a period of not less than ten years. The selection, appointment or dismissal procedure of a judge shall be determined by law.

KOSOVO

Article 105: Mandate and Reappointment

1. The initial mandate for judges shall be three years. The reappointment mandate is permanent until the retirement age as determined by law or unless removed in accordance with law.

COMMENTARY

International standards provide that a judge must be appointed for life or for the duration of the office's mandate. There is no international standard relating to probationary periods. Presumably, the permanent appointment of a judge following a probation period must comply with the same standards as permanent appointment under other circumstances.

The regional standard is more specific. The European Charter contemplates the permanent appointment of judges following a probationary period. It specifies that the same kind of independent authority required in the appointment of judges where there is no probationary period applies. Appointment by a judicial council in which there is a majority of judges would meet this standard. See also Section 10 above for the standards applicable to the appointment of judges.

Whereas the Constitutions of Ukraine and Kosovo specify that judicial terms shall be permanent, in Moldova the length of judicial terms are left to law. In Georgia, the Constitution states that judicial appointments may not be for less than ten years. In Romania and Lithuania the Constitutions are silent as to judicial terms.

16. JUDICIAL IMMUNITY

GUIDELINES

INTERNATIONAL

Universal Charter of the Judge

Art. 10 - Civil and Penal Responsibility

Civil action, in countries where this is permissible, and criminal action, including arrest, against a judge must only be allowed under circumstances ensuring that his or her independence cannot be influenced.

United Nations Basic Principles on the Independence of the Judiciary

16. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.

International Association of Judicial Independence and World Peace Mt. Scopus Approved Revised International Standards of Judicial Independence [Approved March 19, 2008]

8.1. A judge shall enjoy immunity from legal actions in the exercise of his official functions.

REGIONAL

European Charter on the Statute for Judges

Article 5.1. The dereliction by a judge of one of the duties expressly defined by the statute, may only give rise to a sanction upon the decision, following the proposal, the recommendation, or with the agreement of a tribunal or authority composed at least as to one half of elected judges, within the framework of proceedings of a character involving the full hearing of the parties, in which the judge proceeded against must be entitled to representation. The scale of sanctions which may be imposed is set out in the statute, and their imposition is subject to the principle of proportionality. The decision of an executive authority, of a tribunal, or of an authority pronouncing a sanction, as envisaged herein, is open to an appeal to a higher judicial authority.

Article 5.2. Compensation for harm wrongfully suffered as a result of the decision or the behavior of a judge in the exercise of his or her duties is guaranteed by the State. The statute may provide that the State has the possibility of applying, within a fixed limit, for reimbursement from the judge by way of legal proceedings in the case of a gross and inexcusable breach of the rules governing the performance of judicial duties. The submission of the claim to the competent court must form the subject of prior agreement with the authority referred to at paragraph 1.3 hereof.

Article 5.3. Each individual must have the possibility of submitting without specific formality a complaint relating to the miscarriage of justice in a given case to an independent body. This body has the power, if a careful and close examination makes a dereliction on the part of a judge indisputably appear, such as envisaged at paragraph 5.1 hereof, to refer the matter to the disciplinary authority, or at the very least to recommend such referral to an authority normally competent in accordance with the statute, to make such a reference.

Explanatory memorandum

5.1 The Charter deals here with the judge's disciplinary liability. It begins with a reference to the principle of the legality of disciplinary sanctions, stipulating that the only valid reason for imposing sanctions is the failure to perform one of the duties explicitly defined in the Judges' Statute and that the scale of applicable sanctions must be set out in the judges' statute. Moreover, the Charter lays down guarantees on disciplinary hearings: disciplinary sanctions can only be imposed on the basis of a decision taken following a proposal or recommendation or with the agreement of a tribunal or authority, at least one half of whose members must be elected judges. The judge must be given a full hearing and be entitled to representation. If the sanction is actually imposed, it must be chosen from the scale of sanctions, having due regard to the principle of proportionality. Lastly, the Charter provides for a right of appeal to a higher judicial authority against any decision to impose a sanction taken by an executive authority, tribunal or body, at least half of whose membership are elected judges. The current wording of this provision does not require the availability of such a right of appeal against a sanction imposed by Parliament.

5.2 State compensation shall be paid for damage sustained as a result of a judge's wrongful conduct or unlawful exercise of his or her functions whilst acting as a judge. This means that it is the State which is in every case the guarantor of compensation to the victim for such damage.

In specifying that such a State guarantee applies to damage sustained as a result of a judge's wrongful conduct or unlawful exercise of his or her functions, the Charter does not necessarily refer to the wrongful or unlawful nature of the conduct or of the exercise of functions, but rather emphasises the damage sustained as a result of that "wrongful" or "unlawful" nature. This is fully compatible with liability based not upon misconduct by the judge, but upon the abnormal, special and serious nature of the damage resulting from his or her wrongful conduct or unlawful exercise of functions. This is important in the light of concerns that judges' judicial independence should not be affected through a civil liability system.

The Charter also provides that, when the damage which the State had to guarantee is the result of a gross and inexcusable breach of the rules governing the performance of judicial duties, the statute may confer on the State the possibility of bringing legal proceedings with a view to requiring the judge to reimburse it for the compensation paid within a limit fixed by the statute. The requirement for gross and inexcusable negligence and the legal nature of the proceedings to obtain reimbursement must constitute significant guarantees that the procedure is not abused. An additional guarantee is provided by way of the prior agreement which the authority referred to at paragraph 1.3 must give before a claim may be submitted to the competent court.

5.3 Here the Charter looks at the issue of complaints by members of the public about miscarriages of justice. States have organised their complaints procedures to varying degrees, and it is not always very well organised. This is why the Charter provides for the possibility to be open to an individual to make a complaint of miscarriage of justice in a given case to an independent body, without having to observe specific formalities. Were full and careful consideration by such a body to reveal a clear *prima facie* disciplinary breach by a judge, the body concerned would have the power to refer the matter to the disciplinary authority having jurisdiction over judges, or at least to a body competent, under the rules of the national statute, to make such referral. Neither this body nor this authority will be constrained to adopt the same opinion as the body to which the complaint was made. In the outcome there are genuine guarantees against the risks of the complaints procedure being led astray by those to be tried, desiring in reality to bring pressure to bear on the justice system. The independent body concerned would not necessarily be designed specifically to verify whether judges have committed breaches. Judges have no monopoly on miscarriages of justice. It would therefore be conceivable for this same independent body similarly to refer matters, when it considers such referral justified, to the disciplinary authority having jurisdiction over, or to the body responsible for taking proceedings against lawyers, court officials, bailiffs, etc.

The Charter, however, relating to the judges' statute, has to cover in greater detail only the matter of referral relating to judges.

Consultative Council of European Judges Opinion No. 3 on the Principles and Rules Governing Judges' Professional Conduct, in Particular Ethics, Incompatible Behavior and Impartiality [November 2002]

52. Judges who in the conduct of their office commit what would in any circumstances be regarded as crimes (e.g. accept bribes) cannot claim immunity from ordinary criminal process. The answers to questionnaire show that in some countries even well-intentioned judicial failings could constitute crimes. Thus, in Sweden and Austria judges (being assimilated to other public functionaries) can be punished (e.g. by fine) in some cases of gross negligence (e.g. involving putting or keeping someone in prison for too long).

53. Nevertheless, while current practice does not therefore entirely exclude criminal liability on the part of judges for unintentional failings in the exercise of their functions, the CCJE does not regard the introduction of such liability as either generally acceptable or to be encouraged. A judge should not have to operate under the threat of a financial penalty, still less imprisonment, the presence of which may, however sub-consciously, affect his judgment.

54. The vexatious pursuit of criminal proceedings against a judge whom a litigant dislikes has become common in some European states. The CCJE considers that in countries where a criminal investigation or proceedings can be started at the instigation of a private individual, there should be a mechanism for preventing or stopping such investigation or proceedings against a judge relating to the purported performance of his or her office where there is no proper case for suggesting that any criminal liability exists on the part of the judge.

Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities (Adopted by the Committee of Ministers on 17 November 2010)

Liability and Disciplinary Proceedings

66. The interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to civil or disciplinary liability, except in cases of malice and gross negligence.

67. Only the state may seek to establish the civil liability of a judge through court action in the event that it has had to award compensation.

68. The interpretation of the law, assessment of facts or weighing of evidence carried out by judges to determine cases should not give rise to criminal liability, except in cases of malice.

69. Disciplinary proceedings may follow where judges fail to carry out their duties in an efficient and proper manner. Such proceedings should be conducted by an independent authority or a court with all the guarantees of a fair trial and provide the judge with the right to challenge the decision and sanction. Disciplinary sanctions should be proportionate.

70. Judges should not be personally accountable where their decision is overruled or modified on appeal.

71. When not exercising judicial functions, judges are liable under civil, criminal and administrative law in the same way as any other citizen.

CONSTITUTIONAL COMPARISON

UKRAINE [CURRENT]

Article 126

The independence and immunity of judges are guaranteed by the Constitution and the laws of Ukraine.

Article 149

Judges of the Constitutional Court of Ukraine are subject to the guarantees of independence and immunity and to the grounds for dismissal from office envisaged by Article 126 of this

Constitution, and the requirements concerning incompatibility as determined in Article 127, paragraph two of this Constitution.

MOLDOVA

Article 116: Status of judges

1. Judges sitting in the courts of law shall be independent, impartial and irremovable under the law.
5. Sanctioning of the judges shall be carried out pursuant to the law..

ROMANIA

Article 125: Rules Governing Judges

1. Judges appointed by the President of Romania shall be irremovable in accordance with the law.
2. The proposals for appointment of judges, their promotion and transfer as well as sanctions against judges shall be within the exclusive competence of the High Council of the Judiciary, under the terms of its organic law.

POLAND

Article 181

A judge shall not, without prior consent granted by a court specified by statute, be held criminally responsible nor deprived of liberty. A judge shall be neither detained nor arrested, except for cases when he has been apprehended in the commission of an offence and in which his detention is necessary for securing the proper course of proceedings. The president of the competent local court shall be forthwith notified of any such detention and may order an immediate release of the person detained.

LITHUANIA

Article 114

Interference by institutions of State power and governance, Members of the Seimas and other officials, political parties, political and public organization, or citizens with the activities of a judge or the court shall be prohibited and shall incur liability provided for by law.

A judge may not be held criminally liable, arrested or have his freedom restricted otherwise without the consent of the Seimas, or, in the period between the sessions of the Seimas, without the consent of the President of the Republic of Lithuania.

Article 115

Judges of courts of the Republic of Lithuania shall be dismissed from office according to the procedure established by law in the following cases:

1. of their own will;
2. upon expiration of the term of powers or upon reaching the pensionable age established by law;

3. due to the state of health;
4. upon the election to another office or upon their transfer, with their consent, to another place of work;
5. when by their behavior they discredit the name of the judge;
6. upon coming into effect of court judgements convicting them.

Article 116

For a gross violation of the Constitution, breach of oath, or when it transpires that a crime has been committed, the President and justices of the Supreme Court as well as the President and judges of the Court of Appeal may be removed from office by the Seimas according to the procedure for impeachment proceedings.

GEORGIA

Article 87

1. A judge shall enjoy personal immunity. Criminal proceeding of a judge, his/her arrest or detention, the search of his/her apartment, car, workplace or his/her person shall be permissible by the consent of the President of the Supreme Court of Georgia, except when he/she is caught *flagrante delicto*, which shall immediately be notified to the President of the Supreme Court of Georgia. Unless the President of the Supreme Court gives his/her consent to the arrest or detention, the arrested or detained judge shall immediately be released.

Article 88

5. A member of the Constitutional Court shall enjoy personal immunity. A member of the Constitutional Court shall not be proceeded, arrested or detained, nor shall his/her apartment, car, workplace or his/her person be subject to search without the consent of the Constitutional Court, except when he/she is caught *flagrante delicto*, which shall immediately be notified to the Constitutional Court. Unless the Constitutional Court gives its consent to the arrest or detention, an arrested or detained member shall immediately be released.

Article 90

4. The President and the members of the Supreme Court of Georgia shall enjoy personal immunity. Criminal proceeding of the President or a judge of the Supreme Court, their arrest or detention, the search of their apartment, car, workplace or person shall be permissible only by the consent of the Parliament, except when the President or a judge is caught *flagrante delicto*, which shall immediately be notified to the Parliament. Unless the Parliament gives its consent, the arrested or detained shall immediately be released.

KOSOVO

Article 107: Immunity

1. Judges, including lay-judges, shall be immune from prosecution, civil lawsuit and dismissal for actions taken, decisions made or opinions expressed that are within the scope of their responsibilities as judges.

2. Judges, including lay-judges, shall not enjoy immunity and may be removed from office if they have committed an intentional violation of the law.

Article 117: Immunity

Judges of the Constitutional Court shall be immune from prosecution, civil lawsuit and dismissal for actions taken, decisions made or opinions expressed that are within the scope of their responsibilities as Judges of the Constitutional Court.

COMMENTARY

International and regional guidelines on the subject of judicial immunity are not entirely consistent. Whereas the United Nations Basic Principles on the Independence of the Judiciary state that judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions, the United Nations Basic Principles on the Independence of the Judiciary are not as extensive in their protections against civil liability; they merely state that civil actions against a judge must be carried out in a way that does not compromise judicial independence. The Mt. Scopus Standards, promulgated by judges themselves, go further and provide for immunity per se in the exercise of official judicial functions.

Regional guidelines provide more protections for judges. The European Charter on the Statute for Judges creates a detailed procedure for determining whether sanctions lie against a judge. An independent authority, half of whose members are judges, is charged with making recommendations about judicial sanctions in cases involving gross or inexcusable breaches of judicial duty, and any sanctions that are imposed must be proportional to the act committed. The right to an appeal is specifically provided for. However, with respect to liability in civil cases, it provides a kind of indirect immunity by granting individuals the right to sue the State for damages incurred as the result of a judicial decision. The immunity is not total since in exceptional cases, the State under such a scenario claim indemnification from the judge. The Opinion of the Consultative Council of European Judges states that judges may not claim immunity for committing crimes while in office.

The current Constitution of Ukraine provides broad language protecting judicial independence and immunity but does not specify in what, if any, circumstances a judge may be sanctioned or held criminally or civilly liable. The Constitutions of Moldova and Romania state that judges shall be irremovable and that any sanctions imposed shall be carried out according to law. In Romania, sanctions are imposed by the High Council of the Judiciary, and in Lithuania judges may not be held liable without permission from the legislative branch.

The Constitution of Georgia provides the most detail in terms of judicial immunity and states that criminal proceedings against a judge, arrest or detention, and searches of homes, car, workplace and person may only generally be carried out with the permission of the President of the Supreme Court. Judges of the Constitutional Court may only be detained with the permission of the Constitutional Court. Judges on the Supreme Court may only be arrested or detained with the consent of Parliament.

Language regarding judicial immunity in Kosovo is clear. Judges are protected from prosecution, civil liability, and dismissal for any action taken within the scope of their responsibilities but are not protected against intentional violations of law.

It should be noted that the provisions regarding judicial immunity in Lithuania and Georgia have the potential for violating separation of powers doctrines and may arguably allow for undue political influence.

17. IMPEACHMENT OF JUDGES

GUIDELINES

INTERNATIONAL

There are no international standards on impeachment in the sense used in this section.

REGIONAL

European Charter on the Statute for Judges

1. General Principles

5.3. Each individual must have the possibility of submitting without specific formality a complaint relating to the miscarriage of justice in a given case to an independent body. This body has the power, if a careful and close examination makes a dereliction on the part of a judge indisputably appear, such as envisaged at paragraph 5.1 hereof, to refer the matter to the disciplinary authority, or at the very least to recommend such referral to an authority normally competent in accordance with the statute, to make such a reference.

Explanatory Memorandum

5.3 Here the Charter looks at the issue of complaints by members of the public about miscarriages of justice. States have organised their complaints procedures to varying degrees, and it is not always very well organised.

This is why the Charter provides for the possibility to be open to an individual to make a complaint of miscarriage of justice in a given case to an independent body, without having to observe specific formalities. Were full and careful consideration by such a body to reveal a clear prima facie disciplinary breach by a judge, the body concerned would have the power to refer the matter to the disciplinary authority having jurisdiction over judges, or at least to a body competent, under the rules of the national statute, to make such referral. Neither this body nor this authority will be constrained to adopt the same opinion as the body to which the complaint was made. In the outcome there are genuine guarantees against the risks of the complaints procedure being led astray by those to be tried, desiring in reality to bring pressure to bear on the justice system.

The independent body concerned would not necessarily be designed specifically to verify whether judges have committed breaches. Judges have no monopoly on miscarriages of justice. It would therefore be conceivable for this same independent body similarly to refer matters, when it considers such referral justified, to the disciplinary authority having jurisdiction over, or to the body responsible for taking proceedings against lawyers, court officials, bailiffs, etc.

The Charter, however, relating to the judges' statute, has to cover in greater detail only the matter of referral relating to judges.

CONSTITUTIONAL COMPARISON

UKRAINE [CURRENT]

Nothing relating to impeachment.

MOLDOVA

Nothing relating to impeachment.

ROMANIA

Nothing relating to impeachment.

POLAND

Nothing relating to impeachment.

LITHUANIA

Article 74

The President of the Republic, the President and justices of the Constitutional Court, the President and justices of the Supreme Court, the President and judges of the Court of Appeal as well as the Members of the Seimas who have grossly violated the Constitution or breached their oath, or if it transpires that a crime has been committed, may by a 3/5 [three-fifths] majority vote of all the Members of the Seimas be removed from office or their mandate of a Member of the Seimas may be revoked. This shall be performed according to the procedure for impeachment proceedings which shall be established by the Statute of the Seimas.

Article 116

For a gross violation of the Constitution, breach of oath, or when it transpires that a crime has been committed, the President and justices of the Supreme Court as well as the President and judges of the Court of Appeal may be removed from office by the Seimas according to the procedure for impeachment proceedings.

Article 105

The Constitutional Court shall consider and adopt a decision whether the laws of the Republic of Lithuania and other acts adopted by the Seimas are not in conflict with the Constitution of the Republic of Lithuania. The Constitutional Court shall also consider if the following are not in conflict with the Constitution and laws:

1. acts of the President of the Republic;
2. acts of the Government of the Republic.

The Constitutional Court shall present conclusions:

1. whether there were violations of election laws during elections of the President of the Republic or elections of members of the Seimas;
2. whether the state of health of the President of the Republic allows him to continue to hold office;
3. whether international treaties of the Republic of Lithuania are not in conflict with the Constitution;
4. whether concrete actions of Members of the Seimas and State officials against whom an impeachment case has been instituted are in conflict with the Constitution.

Article 108

The powers of a justice of the Constitutional Court shall cease:

1. upon the expiration of the term of powers;
2. upon his death;
3. upon his resignation;
4. when he is incapable to hold office due to the state of his health;
5. when the Seimas removes him from office in accordance with the procedure for impeachment proceedings.

GEORGIA

Article 64

1. In case of the violation of the Constitution, commission of high treason and other criminal offences, not less than one third of the total number of the members of the Parliament shall be entitled to raise the question about the dismissal in accordance **with impeachment procedure of the President of the**

Supreme Court, members of the Government, the Prosecutor General, the President of the Chamber of Control and members of the Council of National Bank.

2. After having received the conclusion in accordance with a procedure envisaged in the second paragraph of Article 63, the Parliament shall be authorised to dismiss the officials listed in the first paragraph of the present Article by the majority of the total number of the members of the Parliament. The requirements of the fourth paragraph of Article 63 shall apply to such cases as well.

KOSOVO

Nothing relating to impeachment.

COMMENTARY

Apparently, the term “impeachment” in this context is being used in connection with a proposal to grant ordinary citizens to remove a judge through a kind of plebiscite that would have to be initiated by twenty percent of the population of Ukraine and to grant the same kind of proceeding to be initiated by a vote of one third of the Parliament. The Venice Commission is emphatically opposed to this proposal. This opposition is entirely justified due to the clear danger that citizens or parliament might very likely initiate such proceedings in the event that they were displeased by a judicial decision, and this eventuality would clearly negatively impact the independence of judges. However, it must be noted that European standards require that citizens be afforded an opportunity to file complaints against judges and bring those complaints before an independent body. This requirement will be met when the law establishing the judicial council establishes such a procedure. There is no standard or rule that requires that this remedy must be provided by the Constitution but it must be provided by law.

This procedure is eminently preferable to the current proposal because under this scenario the judicial council would act as a buffer against potentially frivolous or unfounded complaints by citizens or members of Parliament. In this case, the judicial council would be in a position professionally and impartially review the complaint brought by either of these parties to determine whether a legitimate disciplinary action against the judge in question is warranted.

18. RETIREMENT AGE FOR JUDGES

GUIDELINES

INTERNATIONAL

United Nations Basic Principles on the Independence of the Judiciary

11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.

REGIONAL

European Charter on the Statute for Judges

1. General Principles

6.4. In particular the statute ensures that judges who have reached the legal age of judicial retirement, having performed their judicial duties for a fixed period, are paid a retirement pension, the level of which must be as close as possible to the level of their final salary as a judge.

Explanatory Memorandum

6.4 It specifies in this context that judges who have reached the age of judicial retirement after the requisite time spent as judges must benefit from payment of a retirement pension, the level of which must be as close as possible to the level of their final salary as a judge.

CONSTITUTIONAL COMPARISON

UKRAINE [CURRENT]

Article 126

Judges hold office for permanent terms, except judges of the Constitutional Court of Ukraine, and judges appointed to the office of judge for the first time. A judge is dismissed from office by the body that elected or appointed him or her in the event of:

1. the expiration of the term for which he or she was elected or appointed;
2. the judge's attainment of the age of sixty-five;
3. the impossibility to exercise his or her authority for reasons of health;
4. the violation by the judge of requirements concerning incompatibility;
5. the breach of oath by the judge;
6. the entry into legal force of a verdict of guilty against him or her;
7. the termination of his or her citizenship;
8. the declaration that he or she is missing, or the pronouncement that he or she is dead;
9. the submission by the judge of a statement of resignation or of voluntary dismissal

from office.

The authority of the judge terminates in the event of his or her death.

MOLDOVA

Article 116: Status of judges

1. Judges sitting in the courts of law shall be independent, impartial and irremovable under the law.
2. Judges sitting in the courts of law shall be appointed, under the law, by the President of the Republic of Moldova upon proposal submitted by the Superior Council of Magistrates. Judges who successfully passed the contest shall be firstly appointed for a 5-year term of office. After the expiration of the 5-year term of office, the judges shall be appointed to this position until reaching the age limit fixed under the law.

ROMANIA

Article 125: Rules Governing Judges

1. Judges appointed by the President of Romania shall be irremovable in accordance with the law.
2. The proposals for appointment of judges, their promotion and transfer as well as sanctions against judges shall be within the exclusive competence of the High Council of the Judiciary, under the terms of its organic law.

POLAND

Article 179

Judges shall be appointed for an indefinite period by the President of the Republic on the motion of the National Council of the Judiciary.

Article 180

4. A statute shall establish an age limit beyond which a judge shall proceed to retirement.
5. Where there has been a reorganization of the court system or changes to the boundaries of court districts, a judge may be allocated to another court or retired with maintenance of his full remuneration.

LITHUANIA

Article 115

Judges of courts of the Republic of Lithuania shall be dismissed from office according to the procedure established by law in the following cases:

1. of their own will;
2. upon expiration of the term of powers or upon reaching the pensionable age established by law;

GEORGIA

Article 86

1. A judge shall be a citizen of Georgia who has attained the age of 30, and has the higher legal education and at least five years experience in the practice of law.
2. A judge shall be designated on the position for a period of not less than ten years. The selection, appointment or dismissal procedure of a judge shall be determined by law.

KOSOVO

Article 105: Mandate and Reappointment

1. The initial mandate for judges shall be three years. The reappointment mandate is permanent until the retirement age as determined by law or unless removed in accordance with law.

COMMENTARY

International and regional guidelines do not address mandatory retirement ages for judges. The principal issue they address with respect to retirement is that judges should be guaranteed fair pensions.

Of the countries surveyed, only Ukraine specifies a mandatory retirement age for judges (65) in its Constitution. The Constitutions of Moldova, Poland, Lithuania and Kosovo leave this issue for law, and the United Nations Basic Principles on the Independence of the Judiciary similarly states that retirement ages shall be set by law. The Constitutions of Romania and Georgia do not speak to judicial retirement age at all.

19. DISMISSAL OF JUDGES

GUIDELINES

INTERNATIONAL

United Nations Basic Principles on the Independence of the Judiciary

17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.

18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.

20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.

REGIONAL

Council of Europe, Committee of Ministers, Recommendation R (94) 12

2. Appointed judges may not be permanently removed from office without valid reasons until mandatory retirement. Such reasons, which should be defined in precise terms by the law, could apply in countries where the judge is elected for a certain period, or may relate to incapacity to perform judicial functions, commission of criminal offences or serious infringements of disciplinary rules.

3. Where measures under paragraphs 1 and 2 of this article need to be taken, states should consider setting up, by law, a special competent body which has as its task to apply any disciplinary sanctions and measures, where they are not dealt with by a court, and whose decisions shall be controlled by a superior judicial organ, or which is a superior judicial organ itself. The law should provide for appropriate procedures to ensure that judges in question are

given at least all the due process requirements of the Convention, for instance that the case should be heard within a reasonable time and that they should have a right to answer any charges.

The European Charter on the Statute for Judges

5.1. The dereliction by a judge of one of the duties expressly defined by the statute, may only give rise to a sanction upon the decision, following the proposal, the recommendation, or with the agreement of a tribunal or authority composed at least as to one half of elected judges, within the framework of proceedings of a character involving the full hearing of the parties, in which the judge proceeded against must be entitled to representation. The scale of sanctions which may be imposed is set out in the statute, and their imposition is subject to the principle of proportionality. The decision of an executive authority, of a tribunal, or of an authority pronouncing a sanction, as envisaged herein, is open to an appeal to a higher judicial authority.

Explanatory Memorandum

5.1 The Charter deals here with the judge's disciplinary liability. It begins with a reference to the principle of the legality of disciplinary sanctions, stipulating that the only valid reason for imposing sanctions is the failure to perform one of the duties explicitly defined in the Judges' Statute and that the scale of applicable sanctions must be set out in the judges' statute. Moreover, the Charter lays down guarantees on disciplinary hearings: disciplinary sanctions can only be imposed on the basis of a decision taken following a proposal or recommendation or with the agreement of a tribunal or authority, at least one half of whose members must be elected judges. The judge must be given a full hearing and be entitled to representation. If the sanction is actually imposed, it must be chosen from the scale of sanctions, having due regard to the principle of proportionality. Lastly, the Charter provides for a right of appeal to a higher judicial authority against any decision to impose a sanction taken by an executive authority, tribunal or body, at least half of whose membership are elected judges.

The current wording of this provision does not require the availability of such a right of appeal against a sanction imposed by Parliament.

7. TERMINATION OF OFFICE

7.1. A judge permanently ceases to exercise office through resignation, medical certification of physical unfitness, reaching the age limit, the expiry of a fixed legal term, or dismissal pronounced within the framework of a procedure such as envisaged at paragraph 5.1 hereof.

7.2. The occurrence of one of the causes envisaged at paragraph 7.1 hereof, other than reaching the age limit or the expiry of a fixed term of office, must be verified by the authority referred to at paragraph 1.3 hereof.

Explanatory Note

7.1 Vigilance is necessary about the conditions in which judges' employment comes to be terminated. It is important to lay down an exhaustive list of the reasons for termination of employment. These are when a judge resigns, is medically certified as physically unfit for further judicial office, reaches the age limit, comes to the end of a fixed term of office or is dismissed in the context of disciplinary liability.

187.2 On occurrence of the events which are grounds for termination of employment other than

the ones - ie the reaching of the age limit or the coming to an end of a fixed term of office - which may be ascertained without difficulty, they must be verified by the authority referred to in paragraph 1.3. This condition is easily realised when the termination of office results from a dismissal decided precisely by this authority, or on its proposal or recommendation, or with its agreement.

CONSTITUTIONAL COMPARISON UKRAINE [CURRENT]

Article 126

A judge is **dismissed** from office by the body that elected or appointed him or her in the event of:

1. the expiration of the term for which he or she was elected or appointed;
2. the judge's attainment of the age of sixty-five;
3. the impossibility to exercise his or her authority for reasons of health;
4. the violation by the judge of requirements concerning incompatibility;
5. the breach of oath by the judge;
6. the entry into legal force of a verdict of guilty against him or her;
7. the termination of his or her citizenship;
8. the declaration that he or she is missing, or the pronouncement that he or she is dead;
9. the submission by the judge of a statement of resignation or of voluntary dismissal from office.

The authority of the judge terminates in the event of his or her death.

The State ensures the personal security of judges and their families.

Article 131

The High Council of Justice operates in Ukraine, whose competence comprises:

1. forwarding submissions on the appointment of judges to office or on their **dismissal** from office;
2. adopting decisions in regard to the violation by judges and procurators of the requirements concerning incompatibility;
3. **exercising disciplinary procedure** in regard to judges of the Supreme Court of Ukraine and judges of high specialised courts, and the consideration of complaints regarding decisions on bringing to disciplinary liability judges of courts of appeal and local courts, and also procurators.

PROPOSED UKRAINE AMENDMENT

Proposals no. 3, 14 and 21: Appointment and transfer of judges – removal of competence of the President / appointment of judges to administrative positions / dismissal of judges already appointed for permanent office (Articles 85.27 and 106.23 - Section I.3.a of the Draft Law / Article 128 of the Constitution – Sections I.8.2 and II.3.3 of the Draft Law)

Proposal 21 provides that judges already appointed for permanent office can no longer be dismissed by the President but only by the HJC.

MOLDOVA

Article 123. Powers

The Superior Council of Magistrates shall ensure the appointment, transfer, removal from office, upgrading and imposing of the disciplinary sentences against judges.

ROMANIA

SECTION 3. THE HIGH COUNCIL OF THE JUDICIARY

Article 134. Duties

2. The sections of High Council of the Judiciary serve as **disciplinary courts** for judges and public prosecutors, based on a procedure established by its organic law. In these cases, the Minister of Justice, the President of the High Court of Cassation and Justice, and the Attorney General of the Public Prosecutor's Office are not entitled to vote.

3. Disciplinary decisions by the High Council of the Judiciary may be challenged before the High Court of Cassation and Justice.

POLAND

Article 180

2. Recall of a judge from office, **suspension from office, removal** to another bench or position against his will, may only occur by virtue of a court judgment and only in those instances prescribed in statute.

3. A judge may be retired as a result of illness or infirmity which prevents him discharging the duties of his office. The procedure for doing so, as well as for appealing against such decision, shall be specified by statute.

LITHUANIA

Article 108

The powers of a justice of the Constitutional Court shall cease:

1. upon the expiration of the term of powers;
2. upon his death;
3. upon his resignation;
4. when he is incapable to hold office due to the state of his health;
5. when the Seimas removes him from office in accordance with the procedure for impeachment proceedings.

Article 112

In Lithuania, only citizens of the Republic of Lithuania may be judges.

Justices of the Supreme Court as well as its President chosen from among them shall be appointed and dismissed by the Seimas upon the submission of the President of the Republic.

Judges of the Court of Appeal as well as its President chosen from among them shall be appointed by the President of the Republic upon the assent of the Seimas.

Article 115

Judges of courts of the Republic of Lithuania shall be dismissed from office according to the procedure established by law in the following cases:

1. of their own will;
2. upon expiration of the term of powers or upon reaching the pensionable age established by law;
3. due to the state of health;
4. upon the election to another office or upon their transfer, with their consent, to another place of work;
5. when by their behavior they discredit the name of the judge;
6. upon coming into effect of court judgments convicting them.

Article 116

For a gross violation of the Constitution, breach of oath, or when it transpires that a crime has been committed, the President and justices of the Supreme Court as well as the President and judges of the Court of Appeal may be removed from office by the Seimas according to the procedure for impeachment proceedings.

GEORGIA

Article 64

1. In case of the violation of the Constitution, commission of high treason and other criminal offences, not less than one third of the total number of the members of the Parliament shall be entitled to raise the question about the dismissal in accordance **with impeachment procedure of the President of the Supreme Court**, members of the Government, the Prosecutor General, the President of the Chamber of Control and members of the Council of National Bank.
2. After having received the conclusion in accordance with a procedure envisaged in the second paragraph of Article 63, the Parliament shall be authorised to dismiss the officials listed in the first paragraph of the present Article by the majority of the total number of the members of the Parliament. The requirements of the fourth paragraph of Article 63 shall apply to such cases as well.

Article 84

2. The **removal** of a judge from the consideration of a case, his/her pre-term dismissal or transfer to another position shall be permissible only in the circumstances determined by law.

KOSOVO

Article 84. Competencies of the President

The President of the Republic of Kosovo:

15. appoints and **dismisses the President of the Supreme Court** of the Republic of Kosovo upon the proposal of the Kosovo Judicial Council;
16. appoints and **dismisses judges** of the Republic of Kosovo upon the proposal of the Kosovo Judicial Council;

Article 103. Organization and Jurisdiction of the Courts

4. The President of the Supreme Court of Kosovo shall be appointed and **dismissed by the President of the Republic** of Kosovo from among the judges of the Supreme Court for a non-renewable term of seven (7) years upon proposal by the Kosovo Judicial Council for the appointment or dismissal.

Article 104. Appointment and Removal of Judges.

1. The President of the Republic of Kosovo shall appoint, reappoint and dismiss judges upon the proposal of the Kosovo Judicial Council.
2. The composition of the judiciary shall reflect the ethnic diversity of Kosovo and internationally recognized principles of gender equality.
3. The composition of the courts shall reflect the ethnic composition of the territorial jurisdiction of the respective court. Before making a proposal for appointment or reappointment, the Kosovo Judicial Council consults with the respective court.
4. Judges may be removed from office upon conviction of a serious criminal offense or for serious neglect of duties.
5. A judge has the right to directly appeal a decision of dismissal to the Kosovo Supreme Court.

Article 118. Dismissal

Judges of the Constitutional Court may be dismissed by the President of the Republic of Kosovo upon the proposal of two thirds (2/3) of the judges of the Constitutional Court only for the commission of a serious crime or for serious neglect of duties.

COMMENTARY

Certain basic requirements relating to the dismissal of judges can be extracted from the international and regional standards taken together. First, the standards call for the determination of the grounds for dismissal to be made by an independent body, and where dismissal is dealt with by a judicial council, this requirement will be met. A judge who is subject to these proceedings must have the right to a fair hearing in accordance with the fair hearing standards set out in the European Convention. The judge is entitled to legal representation, and the determination must be subject to an independent review. Review by a court would certainly meet this standard, and it should be mentioned that where a judge's dismissal is based upon a criminal conviction, Protocol 7 of the Convention requires that there be an appeal from that conviction. The standards do, however, recognize that where the dismissal is based on other grounds, there may be no independent review for dismissal of justices of the Supreme Court or for dismissals which occur as the result of impeachment of a judge by Parliament. Finally, dismissal must be based upon grounds that have been clearly established in precise terms.

In reviewing the Constitutions studied, in addition to the Constitution of Ukraine, the constitution of Moldova, Romania, and Kosovo provide for dismissal by the judicial council thus meeting the standard for determination by an independent body. Under the Constitution of Lithuania the Parliament dismisses judges on proposal by the President of the Republic. The Constitutions of Poland and Georgia do not deal with this requirement, except that Georgia's Constitution does provide for an exceptional impeachment procedure to remove the President of

the Supreme Court. In that case, the charge must be raised by a vote of one third of the members of Parliament and the President of the Supreme Court can be thereafter dismissed if the Parliament finds, by a majority vote, that s/he has violated the Constitution, committed high treason, or another criminal offence.

The seven constitutions say very little about the standards justifying dismissal. The Ukrainian Constitution provides for dismissal for violation of the standards relating to incompatibility (conflict of interest) and for breach of oath without providing specificity for either. There are no standards for removal to be found in the constitutions of Moldova, Romania, and Georgia. The Constitution of Poland requires only that the standards be established by statute, the Constitution of Lithuania provides for dismissal upon behavior that discredits “the name of the judge” or for conviction of a crime, and the Constitution of Kosovo requires dismissal based upon conviction of a crime or serious neglect of duties. It may well be, of course, that standards for dismissal are set out more specifically in statutory law in the countries studied, but this comparative view shows that the Constitutions do not offer much specificity on this subject.

20. DISMISSAL OF JUDGES FOR BREACH OF OATH

GUIDELINES

INTERNATIONAL

United Nations Basic Principles on the Independence of the Judiciary Discipline, Suspension and Removal

17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.

18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.

20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.

REGIONAL

Council of Europe, Committee of Ministers, Recommendation R (94) 12

2. Appointed judges may not be permanently removed from office without valid reasons until mandatory retirement. Such reasons, which should be defined in precise terms by the law, could apply in countries where the judge is elected for a certain period, or may relate to incapacity to perform judicial functions, commission of criminal offences or serious infringements of

disciplinary rules.

3. Where measures under paragraphs 1 and 2 of this article need to be taken, states should consider setting up, by law, a special competent body which has as its task to apply any disciplinary sanctions and measures, where they are not dealt with by a court, and whose decisions shall be controlled by a superior judicial organ, or which is a superior judicial organ itself. The law should provide for appropriate procedures to ensure that judges in question are given at least all the due process requirements of the Convention, for instance that the case should be heard within a reasonable time and that they should have a right to answer any charges.

Oleksandr Volkov v. Ukraine [European Court of Human Rights (9/1/2013)]

The ECtHR unanimously held that the absence of guidelines preventing arbitrary interpretation of the legal theory of “breach of oath” by a judge, resulting in his removal from office, violated Article 8 of the European Convention on Human Rights.

CONSTITUTIONAL COMPARISON

UKRAINE [CURRENT]

Article 126

A judge is dismissed from office by the body that elected or appointed him or her in the event of:

5. the breach of oath by the judge;

MOLDOVA

Nothing specific in Constitution regarding judicial oath. Regarding oaths of public servants generally, see below.

Article 56: Devotedness towards the country

1. Devotedness towards the country shall be sacred.
2. Citizens holding public offices, as well as military persons shall be held responsible for loyal fulfilment of the obligations they are bound to, and in cases foreseen by law, they shall take the oath as requested.

ROMANIA

Nothing specific in Constitution regarding judicial oath. Regarding public servants generally, see below.

Article 54: Loyalty to the Country

1. Loyalty to the country is a sacred duty.

2. Citizens entrusted with public functions and military men are responsible for faithfully fulfilling their duties and, for this purpose, will take the oath required by law.

POLAND

Nothing in Constitution regarding judicial oath.

LITHUANIA

Article 112

In Lithuania, only citizens of the Republic of Lithuania may be judges.

Justices of the Supreme Court as well as its President chosen from among them shall be appointed and dismissed by the Seimas upon the submission of the President of the Republic.

Judges of the Court of Appeal as well as its President chosen from among them shall be appointed by the President of the Republic upon the assent of the Seimas.

Judges and presidents of local, regional, and specialised courts shall be appointed, and their places of work shall be changed by the President of the Republic.

A special institution of judges provided for by law shall advise the President of the Republic on the appointment, promotion, transfer of judges, or their dismissal from office.

A person appointed judge shall take an oath, according to the procedure established by law, to be faithful to the Republic of Lithuania and to administer justice only according to law.

Article 116

For a gross violation of the Constitution, **breach of oath**, or when it transpires that a crime has been committed, the President and justices of the Supreme Court as well as the President and judges of the Court of Appeal may be removed from office by the Seimas according to the procedure for impeachment proceedings.

GEORGIA

Nothing in Constitution regarding judicial oath.

KOSOVO

Nothing in Constitution regarding judicial oath.

COMMENTARY

There are no international or regional standards on this subject, and this analysis is therefore confined to an examination of practice in the region as gleaned from what the constitutions of the countries studied say on this point. The first observation to be made is that Ukraine, under its current Constitution, is the only country whose Constitution provides for dismissal of any judge for breach of oath.

Lithuania's Constitution requires judges to take an oath and it does provide for dismissal for breaching it, but only for judges of the Supreme Court and Court of Appeals. The Constitutions of Poland, Georgia, and Kosovo say nothing on the subject, and those of Moldova and Romania require public officials generally to take an oath (and this would presumably include judges), but they do not provide for the sanction of dismissal for breaching it.

That leaves the analysis of this question to a review of the standards for dismissal generally. For a review of the international and regional standards for dismissal see Section 18, above. See also the specific language of the Constitutions on that topic. In reviewing those standards, it is clear that the use of a breach of oath as a grounds for dismissal is not sufficient in and of itself to justify dismissal or removal since the standards on this point make it clear that grounds for dismissal have to be sufficiently specific, and the judge in question must be given an appeal to an independent tribunal.

It should be noted that the current Ukrainian Constitution provides also for dismissal for violation of the rules on incompatibility without setting out those rules. See the Section above on Dismissal of Judges.

21. TERM OF OFFICE OF PROSECUTOR GENERAL

GUIDELINES

INTERNATIONAL

United Nations Guidelines on the Role of Prosecutors (1990)

Status and conditions of service

6. Reasonable conditions of service of prosecutors, adequate remuneration and, where applicable, tenure, pension and age of retirement shall be set out by law or published rules or regulations.

REGIONAL

Council of Europe Committee of Ministers Recommendation Rec (2000)19 on the Role of Public Prosecution in the Criminal Justice System

5. States should take measures to ensure that:

d. public prosecutors have reasonable conditions of service such as remuneration, tenure and pension commensurate with their crucial role as well as an appropriate age of retirement and that these conditions are governed by law;

Report on "European Judicial Systems – Edition 2014 (2012 data): Efficiency and Quality of Justice" [Ministers of the Council of Europe/European Commission for the Efficiency of Justice]

11.6.1 Terms of judges' and prosecutors' offices

"European practice is generally to make full-time appointments until the legal retirement age, which is the approach least problematic from the viewpoint of independence." (Opinion No. 1 (2001) § 48).

Prosecutors are appointed for a fixed period in **Azerbaijan, Estonia, Iceland and Serbia**, whereas judges are appointed for life. For judges and prosecutors appointed for a fixed period, terms of reference vary from 3 to 10 years. Such periods are generally renewable.

CONSTITUTIONAL COMPARISON

UKRAINE [CURRENT]

Article 122.

The Procuracy of Ukraine is headed by the Procurator General of Ukraine, who is appointed to office and dismissed from office, with the consent of the Verkhovna Rada of Ukraine, by the President of Ukraine.

The Verkhovna Rada of Ukraine may express no confidence in the Procurator General of Ukraine that results in his or her resignation from office.

The term of authority of the Procurator General of Ukraine is five years.

MOLDOVA

Article 125. Mandate of Public Prosecutors

3. The prosecutors' term of office shall be of 5 years.

ROMANIA

Article 132: Basic Rules for Prosecutors

1. The prosecutors carry out their activity in accordance with the principles of legality, impartiality, and hierarchical control under the authority of the Minister of Justice.
2. The office of public prosecutor is incompatible with any other public or private office, with the exception of teaching positions in higher education.

POLAND

Nothing in Constitution regarding Public Prosecutor.

LITHUANIA

Article 118

Pre-trial investigation shall be organised and directed, and charges on behalf of the State in criminal cases shall be upheld by the prosecutor.

When performing his functions, the prosecutor shall be independent and shall obey only the law.

The Prosecutor's Office of the Republic of Lithuania shall be the Office of the Prosecutor-General and territorial prosecutor's offices.

The Prosecutor-General shall be appointed and dismissed by the President of the Republic upon the assent of the Seimas.

GEORGIA

Article 76.1

The President of Georgia shall nominate a candidate of the Prosecutor General of Georgia before the Parliament for appointment. The authority and a procedure of activity of the Prosecutor's office shall be determined by the Organic law.

KOSOVO

Article 109: State Prosecutor

- 1.** The State Prosecutor is an independent institution with authority and responsibility for the prosecution of persons charged with committing criminal acts and other acts specified by law.
- 2.** The State Prosecutor is an impartial institution and acts in accordance with the Constitution and the law.
- 3.** The organization, competencies and duties of the State Prosecutor shall be defined by law.
- 4.** The State Prosecutor shall reflect the multiethnic composition of the Republic of Kosovo and shall respect the principles of gender equality.
- 5.** The mandate for prosecutors shall be three years. The reappointment mandate is permanent until the retirement age as determined by law or unless removed in accordance with law.

Prosecutors may be removed from office upon conviction of a serious criminal offense or for serious neglect of duties.

7. The Chief State Prosecutor shall be appointed and dismissed by the President of the Republic of Kosovo upon the proposal of the Kosovo Prosecutorial Council. The mandate of the Chief State Prosecutor is seven (7) years, without the possibility of reappointment.

COMMENTARY

Remuneration, tenure, pension and age of retirement for prosecutors are generally protected under international and regional guidelines.

The Constitutions of Ukraine, Lithuania and Georgia specify that the Prosecutor General shall be appointed by the President with the consent of the legislative branch. In Kosovo, the State Prosecutor is appointed by the President upon nomination by the Kosovo Prosecutorial Council.

Terms of office for chief prosecutors vary among the surveyed countries. Whereas in Kosovo the term of office is seven years, it is five years in Ukraine and Moldova. No specific term is specified in Romania, Lithuania or Georgia. The Constitution of Poland does not address the Public Prosecutor at all.

22. ROLE OF CITIZENS, ASSESSORS AND JURIES

GUIDELINES

INTERNATIONAL

No international guidelines.

REGIONAL

Case of Taxquet v. Belgium [European Court of Human Rights, Grand Chamber (16 November 2010)]

43. It is clear that there are many different models of lay adjudication in the member States of the Council of Europe. There are variations reflecting cultural and historical particularities even among countries that have opted for the “traditional” trial-by-jury model, the defining feature of which is that professional judges are unable to take part in the jurors’ deliberations on the verdict.

44. The member States may be divided into three categories: those without any form of jury trial or any model of lay adjudication in criminal matters; those using a collaborative court model of lay adjudicators sitting and deliberating alongside professional judges in criminal matters; and those which have opted for the “traditional” jury model in criminal matters.

45. Among the models examined, fourteen Council of Europe member States have never had a jury system or any other form of lay adjudication in criminal matters or have abolished it: Albania, Andorra, Armenia, Azerbaijan, Bosnia and Herzegovina, Cyprus, Latvia, Lithuania, Luxembourg, Moldova, the Netherlands, Romania, San Marino and Turkey. In these States criminal courts are composed exclusively of professional judges.

46. The member States with a collaborative system are Bulgaria, Croatia, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Liechtenstein, Monaco, Montenegro, Norway (in most cases), Poland, Portugal, Serbia, Slovakia, Slovenia, Sweden, “the former Yugoslav Republic of Macedonia” and Ukraine. The collaborative system, which can also be employed alongside the traditional jury model, is characterised by the fact that the professional judges and the jurors collectively determine all questions of law and fact, the issue of guilt and the sentence.

47. The ten Council of Europe member States that have opted for a traditional jury system are Austria, Belgium, Georgia, Ireland, Malta, Norway (only in serious appeal cases), the Russian Federation, Spain, Switzerland (the Canton of Geneva until 1 January 2011), and the United Kingdom (England, Wales, Scotland and Northern Ireland).

48. In its traditional form, trial by jury involves a combination of a number of jurors sitting with one or more professional judges. The number of jurors varies according to the country and the subject matter of the proceedings. The number of professional judges varies from country to country. In Ireland, Malta, Russia, Spain, Switzerland and the United Kingdom the court and jury are presided over by a single judge. In Austria, Belgium and Norway the court consists of three professional judges together with the jury. The professional judges cannot take part in the jury’s deliberations on the question of guilt, which falls within the exclusive competence of the jury.

See also Stephen C. Thaman, *Should Criminal Juries Give Reasons for Their Verdicts: The Spanish Experience and the Implications of the European Court of Human Rights Decision in Taxquet v. Belgium*, 86 Chi.-Kent. L. Rev. 613 (2011). Available at: <http://scholarship.kentlaw.iit.edu/cklawreview/vol86/iss2/8>

“The jury has made a slight comeback in recent years in democratizing countries which had finally emerged from totalitarian or authoritarian regimes. Spain included trial by jury in its democratic constitution of 1978 and finally passed legislation to implement the constitutional command in 1995. Russia introduced jury trials in 1993 in nine of its regions and territories, and from 2001 through 2009 expanded the institution to its entire realm. Both countries introduced the European model based on question lists, majority verdicts, and appealability of acquittals. In 2010, the Republic of Georgia introduced an American-style jury with general unanimous verdicts and non-appealability of acquittals. The break-up of the Soviet Union has led to a spate of new constitutions and codes of criminal procedure with many of the newly independent republics flirting with the classic jury (such as Ukraine, Armenia, Azerbaijan, Belarus, Kyrgyzstan), and Kazakhstan has introduced an expanded mixed court patterned after the post-1941 French model (nine lay judges, two professional judges), which it calls a jury court.

Otherwise, many of the former Soviet Republics as well as the new democracies in the former socialist Eastern Europe have maintained a mixed court similar to that employed by the Germans and the Soviets. According to the ECtHR, fourteen members of the Council of Europe have never had, or have abolished, lay participation altogether.”

CONSTITUTIONAL COMPARISON

UKRAINE [CURRENT]

Article 124

The people directly participate in the administration of justice through people's assessors and jurors.

Article 127

Justice is administered by professional judges and, in cases determined by law, people's assessors and jurors.

Article 129

In the administration of justice, judges are independent and subject only to the law. Judicial proceedings are conducted by a single judge, by a panel of judges, or by a court of the jury.

MOLDOVA

Nothing in Constitution

ROMANIA

Article 126: Courts of Law

5. It is prohibited to set up courts with special jurisdiction. Courts specialized in certain areas of law may be set up by an organic law which **may provide, as the case may be, for the participation of persons from outside the judiciary.**

POLAND

Article 182

A statute shall specify the scope of participation by the citizenry in the administration of justice.

LITHUANIA

Nothing in Constitution

GEORGIA

Article 82

5. The cases shall be considered by juries before the courts of general jurisdiction in accordance with a procedure and in cases prescribed by law.

KOSOVO

Nothing in Constitution.

COMMENTARY

There are no international or regional laws or guidelines prohibiting or limiting the participation of lay people in civil or criminal cases. Juries and participation by lay people are included in the Constitutions of Ukraine, Romania, Poland and Georgia.

In the case of *Taxquet v. Belgium*, the European Court of Human Rights addressed whether jurors should give reasoned opinions when returning their verdicts, but the Court did not limit or prohibit the use of juries in courts that are based on European models.

See also the Report on "European Judicial Systems – Edition 2014 (2012 data): Efficiency and Quality of Justice" [Ministers of the Council of Europe/European Commission for the Efficiency of Justice] regarding participation by members of the public in criminal cases. "Currently this system is applied only in some countries (especially in Western Europe) and essentially with regard to the most serious offences. . . ."

According to this report, issues regarding juries composed of members of the public, as well as their motivations, or lack thereof, for participating in juries, raise no problem with respect to Article 6 of the European Convention on Human Rights as long as guidance has been provided by the presiding judge to the jurors on relevant legal issues arising during the trial and precise, unequivocal questions have been put to the jury by the judge. (See *Legillon v. France*, app. n° 53406/10, 10/04/2013, §§ 53 et seq.).

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